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OF

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REPORTS OF CASES
ADJUDGED IN THE
COURT OF CHANCERY,
OF
ONTARIO,
DURING PORTIONS OF THE YEARS 1881 AND 1882.

MCLELLAN V. MCLELLAN.

Will, Construction of—Election—Provision by will—Dower.

A testator devised to his widow his "house and orchard for a home for herself and children as long as she may live," and to his son *Duncan* all his title and interest in the farm lot, and all implements thereon, "at the death of my wife as aforesaid, on condition that he shall provide for her board and maintenance, he, my son *Duncan*, holding possession of the land from the time of my decease, subject to the proviso aforesaid :"

Held, that the widow was put to her election between her dower and the provision made for her by the will; the latter forming a charge upon the lands devised.

This was a suit by *Mary McLellan*, widow of *Donald McLellan*, setting forth that her husband had made and published his last will and testament, dated the 8th day of May, 1877, whereby amongst other devises and bequests, he gave and bequeathed to the plaintiff "the sum of one thousand dollars for her use, and the use of my daughter *Annie Fraser* conjointly; also four sheep and one cow, and pasture with feed for the cow, sheep and horse, with the house and orchard for a home for herself and children as long as

Statement.

1881. she may live. * * (3). To my son *Duncan McLellan* all my right, * * to the farm lot, and all implements thereon. * * at the death of my wife as aforesaid, on condition that he shall provide for her the necessary comforts and for her board and maintenance; he, my son *Duncan*, holding possession of the land from the time of my decease, subject to the proviso aforesaid."

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The bill further stated that *Duncan McLellan* had died intestate, leaving the defendants *Catherine McLellan*, his widow, and his four infant children, also defendants, and prayed that the plaintiff might be declared entitled to a lien on the lands for her support and maintenance, and to her dower in the lands. And in default that the land, except the part to be set apart for dower might, be sold and the proceeds applied in payment of such annual allowance. The only real estate owned by the testator was the lot devised as above.

The case came on by way of motion for decree.

Argument. Mr. *Hoyles* for the plaintiff. The language of this will does not shew with any degree of certainty the testator intended to exclude the widow from dower; to do so there must be some inconsistency on the whole will, or the estate must be insufficient for both objects: *Murphy v. Murphy (a)*. The mere fact that the land was devised to the son, charged with certain allowances, is not sufficient to deprive the widow of the benefits given by the will, and also her dower thereout: *Laidlaw v. Jackes (b)*. The mere gift of an amount of property which is liable to dower, does not put the widow to her election: *Theobald*, 16. Neither does the fact that the testator devised a portion of the realty to the widow.

Mr. *J. Hoskin*, Q. C., for the infant defendants.

(a) 25 Gr. 81.

(b) 27 Gr. at 108-9; S. C. 25 Gr. 293-9.

Mr. *A. Hoskin*, Q. C., for the widow defendant, contended that *McLellan v. Grant* (a), governed this case. *Stewart v. Hunter* (b), *Coleman v. Glanville* (c), *Hutchison v. Sargent* (d), *Beilstein v. Beilstein* (e), were also referred to.

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BOYD, C.—The will is somewhat difficult of construction, but looking at its whole scope, I think that the testator in effect rents the land to his son *Duncan* during the life of the widow, he rendering therefor board and maintenance to his mother. She is separately to enjoy that part of the farm which comprises the house and orchard, and is to get from the place, (*i.e.*, the whole farm) sufficient feed and pasture for the cow, sheep, and horse, mentioned.

I think that these things are all charges on the land, and were in effect the consideration contemplated by the testator for allowing the son to have the land during the mother's life. The estate does not vest in him till the death of the mother. She has by implication a life estate, but subject to the directions given by the testator as to the occupancy and management of the land for her benefit.

May 18th.
 Judgment.

If, then, the widow obtains dower in addition, I think she would disturb the arrangements intended by the testator, and that this case falls within the line of authorities cited by Mr. *Hoskin*. I refer also to *Taylor v. Taylor* (f). The language in this will as applied to the son of "holding possession" of the land is inconsistent with part of it being set off for dower: *Roadley v. Dixon* (g). The provision in the widow's favour is not merely chargeable on the land out of which she seeks dower, as in *Arnold v. Kempstead* (h), but it is also declared to be given "for the necessary comforts and

(a) 15 Gr. 65.

(c) 18 Gr. 42.

(e) 27 Gr. 41.

(g) 3 Russ. 102.

(b) 2 C. Ch. 336.

(d) 16 Gr. 78.

(f) 1 Y. & C. Ch. Ca. 727,

(h) 2 Eden. 236; Ambl. 466.

1881. supplies for her board and maintenance." A comfortable support is thus secured to the widow and charged upon the land, in return for which the son is to hold possession of the whole land that he may be able to furnish this maintenance: *Scribner* on Dower, p. 445; *Becker v. Hammond* (a), *McLellan v. Grant* (b), *Goldsmith v. Goldsmith* (c).

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v.
McLellan.

My conclusion is, that the widow cannot have dower in addition to what is given her by the will.

FENELON FALLS v. VICTORIA RAILWAY CO.

Demurrer—Municipality—Railway Act—Trespass—Streets and highways, repairs of.

A Municipality may file a bill to compel a railway company to put streets and highways improperly traversed by their line of railway in good repair, and will not be restricted to proceeding by indictment or information.

The plaintiffs, a Municipal Corporation, filed a bill seeking to restrain the defendants, a railway company, from trespassing by running their track along one of the streets of the municipality without the consent thereof, thus impeding traffic, in contravention of the Railway Act C. S. C. ch. 66 sec. 12 sub-sec. 1.

Held, that by virtue of the Municipal Act there is such power of management, control &c., bestowed upon municipalities, and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights.

Semble: But for the language used in *Guelph v. The Canada Co.*, ante vol. iv, p. 656, the proper frame of the suit would have been by way of information in the name of the Attorney General, with the corporation as relators.

Statement. The bill in this case was by *The Corporation of the Village of Fenelon Falls* against *The Victoria Railway Company* setting forth that the defendants owned and ran their line of railway through the said village,

(a) 12 Gr. 485.

(b) 15 Gr. 65.

(c) 17 Gr. 213.

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intersecting and traversing several lots and streets within the corporation, the numbers and names of which were set forth, amongst others "Water Street," intersecting a short street running between Park lots Nos. 17, and 18 (2.), that the defendants had not any legal authority to run their track along the existing highway called "Water Street," no consent or authority having been obtained from the municipal council of said village to occupy or locate the line of railway thereon; (3.) that the defendants had failed to construct proper culverts or cattle guards at the streets mentioned, other than Francis Street, as required by law, and neglected to construct proper and suitable approaches to and over their line of railway; (4.) that the defendants had also obstructed and rendered impassible the street called "Water Street" by an unusually high embankment across or along the said street, and by otherwise obstructing the free passage thereof for traffic and trade; (5.) that the defendants had made travel on, and over Louisa street in said village dangerous by reason of the excavation of the adjoining earth, and the removal thereof, and had in the same manner obstructed the short street before mentioned between Park lots 17 and 18, west of Louisa street, so as to prevent travel thereon; (6.) that the defendants had obstructed certain other named streets by excessively raising the crossing of such streets above the adjoining level of the same; (7.) that the defendants had neglected to place proper fences along the line of railway within the limits of said village; (8.) that the defendants had not made and provided open and good passage for carriages upon the said streets and railway crossings, nor had they replaced the highways and streets in the state and to the levels the same had before the commencement of the works of the defendants within the said corporation; and the defendants had in other ways neglected to observe the provisions of the statute in that behalf regulating the construction

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1881. of their railway within the limits of the corporation of the said village.

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The bill further stated (9.) that the defendants had been repeatedly requested to remove the before mentioned obstructions, and to construct the requisite cattle guards and culverts, and to comply with the law as above stated, but they had failed to do so. The prayer of the bill was (1.) that the defendants might be ordered to remove all such obstructions in said streets and highways; (2.) that they might be ordered to construct proper culverts and cattle guards on the line of railway within said village; (3.) that they might be ordered to put the said railway in a proper state of construction, and to procure proper facilities for the travel of horses and vehicles along the said streets at the railway crossings within the village, and otherwise comply with the statutes in that behalf; (4.) and in default of the defendants so doing that they should be restrained by injunction from using the said railway tracks, or running trains thereon within the said village; and for further and other relief.

Statement.

The defendants demurred for want of equity.

The grounds of demurrer argued were principally that the allegations in the bill were not sufficiently specific to require an answer; that some of the offences charged were not offences either by statute or by the common law; that the municipality could not complain of the want of fences, cattle guards, &c.; and that the proper proceeding was by information or indictment, or by application to the inspectors under the statute, and not by suit.

Argument.

Mr. *Cattanach*, in support of the demurrer. None of the statements or allegations in the bill are specific enough to require an answer; the proper course therefore is to demur.

Besides this, there are three classes of work which the

plaintiffs complain of as not being perfectly or properly done namely "culverts," "approaches," and "cattle guards," the last being the only one required by the statute to be constructed; and the law in respect of "cattle guards" is the same as that relating to "fences," that is, no one has a right to complain, other than the adjacent proprietor, and he only for damage to cattle: *McIntosh v. The Grand Trunk R. W. Co. (a)*, *Gillis v. The Great Western R. W. Co. (b)*. Section 22, subsec. 3, and sec. 97 of the Railway Act.

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Sarnia v. The Great Western R. W. Co. (c), is an instance of a suit by a municipality, but that case was maintained only in consequence of a special allegation to the effect that the road was vested in the municipality.

The proper remedy is either by indictment, information, or an application under the statute to the railway inspectors: *Hardcastle* on Statutes, pp. 115, 119, 120; *Atkinson v. Newcastle (d)*.

The acts complained of are, if anything, a public injury and therefore an action will not lie, unless at the instance of an individual who may sustain special injury: *Maxwell* on Statutes, 373; *Ward v. Great Western R.W. Co. (e)*, *Hamilton v. Covert (f)*.

Argument.

The question of the right of a municipality to bring a suit has not yet been decided: *Vespra v. Cook (g)*.

The case of *Guelph v. The Canada Company (h)*, was one founded on contract, and although the form of suit was one of the questions raised, it was not necessary to decide it, and the report of the case shews that much attention was not paid to it in argument.

In *Fredericksburgh v. The Grand Trunk R. W. Co. (i)*,

(a) 30 U. C. R. 601.

(b) 12 U. C. R. 427.

(c) 17 U. C. R. 65.

(d) L. R. 2 Ex. D. 441.

(e) 13 U. C. R. 315.

(f) 16 U. C. C. P. 205.

(g) 26 C. P. 182.

(h) 4 Gr. 632.

(i) 6 Gr. 555.

1881. the question was not raised; and that case therefore cannot be treated as an authority.

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The obligations and liabilities of a municipality in reference to keeping roads in repair do not involve a correlative right to bring an action to keep the roads in order, and therefore, there is no reason why a municipality should have the right.—*Rex. v. Broghton* (a), *Healey v. Batley* (b), *Harrold v. Simcoe* (c), and other cases in our own Courts.

If the municipality has a right to maintain an action then as it clearly has the right to proceed by indictment, the defendants here would be exposed to two proceedings in respect of the same subject matter, at the same time and at the instance of the same party. This of itself is a sufficient reason for allowing the present demurrer.

Argument.

Mr. *Hodgins*, Q.C., contra. The bill states distinctly that the company run their line along certain named streets in the village of “Fenelon Falls”; one of which, “Water street,” the defendants, it is shewn, have obstructed, occupied, and rendered impassable by an unusually high embankment; and it is alleged that neither consent nor authority had been obtained from the municipal council permitting the defendants to run their line of railway along such highway. The fifth and subsequent paragraphs of the bill follow the wording of the statute in shewing that the company have not complied with the provisions of the R. S. O., ch. 165. The permissive powers conferred on the commissioner of public works by sec. 60 are not intended to, neither have they the effect of relieving the defendants from liability for non-repair or diminishing their responsibility under the existing laws of the Province; and therefore these enactments cannot be deemed to have ousted the jurisdiction of this Court.

(a) 5 Burr. 2700.

(b) L. R. 19 Eq. 375.

(c) 16 U. C. C. P. 43.

By the Municipal Act R. S. O., ch. 174, sec. 489, the streets of this village are vested in the municipal corporation, and section 491 requires the corporation to keep the streets in repair, and renders them civilly responsible for any loss or damage sustained by any one in consequence of their default in repairing.

The Act in fact makes the corporation trustees for the ratepayers, and they are bound therefore to see that the duties imposed upon the defendants by the statute are fully complied with, so as to protect their *cestuis que trustent* from the injuries to which they may be liable by reason of the non-repair in which the streets have been left. This duty gives the plaintiffs a right of suit against the defendants; *Guelph v. The Canada Company* (a), *Standly v. Perry* (b), *Fredericksburgh v. The Grand Trunk R. W. Co.* (c), *Masson v. The Grand Junction R. W. Co.* (d).

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Argument.

The remedy by indictment could only result in the imposition of a fine, and would compel the plaintiffs to indict on each recurring delay in repairing, while an injunction would afford a complete remedy.—*Story's Eq. Jur.* sec. 1563; *Redfield's R. Ca.* 299; *Hodges' on Railways*, 395.

Renaud v. The Great Western R. W. Co. (e), *Streetsville v. Hamilton* (f), *Moison v. The Great Western R. W. Co.* (g), *Magee v. The London and Port Stauley R. W. Co.* (h), were also referred to and commented on by counsel.

BOYD, C.—It does not seem to be necessary to consider and dispose of all the matters which were argued on this demurrer. Having regard to the rules of construction applicable to pleadings in Equity which

May 18th.

Judgment.

(a) 4 Gr. 632.

(c) 6 Gr. 555.

(e) 12 U. C. R. 408.

(g) 14 U. C. R. 109.

(b) 23 Gr. at 515.

(d) 26 Gr. 286.

(f) 13 U. C. R. 600.

(h) 6 Gr. 170.

1881. were formulated by the Court in *Grant v. Eddy* (a), sufficient appears on the face of this bill to uphold it as against a general demurrer for want of equity, which was the only line of argument adopted before me. The bill is not very carefully drawn, and leaves perhaps too much to inference; yet upon one point it is explicit, that the defendants have obstructed and rendered impassable for traffic or trade the street in the village called Water street, and this by running their track along this street without legal authority, inasmuch as no consent so to do has been obtained from the Municipal Council of the village, (see paragraphs two and four of the bill). This is in express contravention of the Railway Act, sec. 12 sub-sec. 1. And as to this part of the case the demurrer admits that the railway is trespassing. Upon the frame of the bill as to the *locus standi* of the plaintiffs, I incline to think that by virtue of the provisions of the Municipal Act there is such power of management and control as to highways and streets bestowed upon the local municipalities, and such an interest in the public easement vested in them, and such a responsibility cast upon them in the event of the highways being out of repair, as to justify their intervention as plaintiffs in cases like the present, for the preservation of the rights of the inhabitants, and to restrain other bodies like the defendants from transgressing the statutory regulations imposed upon them in the construction of their works. This is a fair deduction from the language of the Judges to be found in *Guelph v. Canada Company* (b). See also *Fredericksburgh v. G. T. Ry.* (c), *Vespra v. Cook* (d), *Saugeen v. Church Society* (e), and Municipal Act secs. 489, 491, 509, 487, and Con. Stat. Can. cap. 85, *Dillon on Corporations*, sec. 520 and 1. *Redfield R. C. 299*. But for the language in the early Chancery deci-

Judgment.

(a) 21 Gr. 45, 568.
 (c) 6 Gr. 555.
 (e) 6 Gr. 538.

(b) 4 Gr. 6 32.
 (d) 26 C. P. 182.

sions, I should have preferred to hold that the proper frame of suit in this case is by way of information in the name of the Attorney General, with the corporation as relators; but as it is, I adopt the language of the then V. C. *Spragge*, in *Guelph v. Canada Company*, where he says, "I think that the suit is not improperly constituted."

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The demurrer will therefore be over-ruled, with costs.
 Leave to answer on the usual terms.

FOX V. NIPISSING RAILWAY COMPANY.

GOODERHAM V. NIPISSING RAILWAY COMPANY.

Appointment of receiver.

After a decree had been pronounced directing the appointment of a receiver, but before the appointment was completed, the defendant company had made a payment to a creditor, which the plaintiff *F.*, a judgment creditor, alleged to be a fraudulent preference, and moved for an order that the receiver should take proceedings to recover the money so paid.

Held, that as the payment complained of took place before the actual appointment of the receiver, it was more reasonable that those who were interested at the time the payment was made, parties to the suit, and who objected to what had been done, should in person apply for the appropriate relief.

The plaintiff *Fox* having obtained a judgment at law Statement. against the defendants, filed a bill in this court to enforce that judgment and seeking at the same time to obtain the appointment of a receiver of the railway, upon which on the 9th of January, 1879 he obtained a decree granting a receiver and referring it to the Master to make the appointment. While this reference was pending the plaintiffs *Gooderham* presented a petition in their suit also asking the appointment of a receiver, and on the fifth of April, 1879, before any appointment had been made in *Fox's* suit, they obtained a

1881. decree by consent appointing *Joseph Gray* who was, and had been for some time the secretary of the railway company. It was shewn that between the pronouncing of the decree in *Fox's* suit and the appointment of *Gray* under the decree in the other proceeding a payment of about \$2,300 had been made by the defendants to the Bank of Toronto. The claim of the bank on taking the accounts in the Master's office was afterwards found by that officer to be the last in priority of the claims against the defendants. Subsequently the same person (*Gray*) was duly appointed receiver in the suit instituted by *Fox*. It was shewn that the secretary and managing director were duly notified of the making of the decree of the 9th of January, 1879, directing the appointment of a receiver in *Fox's* suit, and had been warned by the solicitors of *Fox* against making any payments of debts due by the company. It also appeared that the receiver had been requested to take proceedings to recover back the amount so paid to the Bank of Toronto, but he refused to do so.

Statement.

The plaintiff *Fox* thereupon presented a petition entitled in the two causes praying for an order directing the receiver to take such proceedings as he might be advised for the recovery of the said sum of \$2,300.

Mr. *G. T. Blackstock*, for the plaintiff *Fox*.

Mr. *Maclennan*, Q. C., for the receiver, contra.

June 1st. BOYD, C.—I am not disposed to make any order on this petition to set the receiver in motion. My chief reason is, that it is not necessary to do so. A very well defined practice is to be found in the books shewing that it is competent and usual for a party to the suit to move to commit if there has been a contempt of Court in interfering with the receiver; *Russell v. Eastern Counties Railway Co. (a)*, *Ward v. Swift (b)*,

Judgment.

(a) 3 D. M. & G. 104.

(b) 6 Hare 313.

which contain reasons shewing that in a case like the present (where such laches exist unexplained) the Court will be slow to interfere by way of commitment unless in a very plain case. So also the party who moved was the plaintiff in *Ames v. Birkenhead* (a), and in *Lane v. Sterne* (b).

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v.
Nipissing.

As the matters complained of were done before the actual appointment of the receiver it is more reasonable that those then interested, parties to the suit, who object to what was done should in person apply for the appropriate relief.

Judgment.

Application refused, without costs.

FRASER V. GUNN.

*Mortgage, assignment of—Mortgage paid but not discharged—
Subsequent incumbrance—Priority.*

The original owner of land created a mortgage thereon in favour of one *M.* and died without redeeming, and the equity of redemption in the premises descended to *C. F.* his heir-at-law, who with her husband *P. F.* joined in a conveyance thereof to trustees charged with the support and maintenance of the plaintiffs, subject to which and the mortgage in favour of *M.* the premises were limited to *P. F.* in fee, who subsequently in September, 1875, out of *W. F.*'s moneys paid the amount due on *M.*'s mortgage, but which was not actually discharged. In December following *P. F.* sold to *W. F.*, conveyed to him the equity of redemption and procured *M.* to assign his mortgage and convey to him the legal estate. In March, 1877, *W. F.* mortgaged the land to a loan company but did not assign the *M.* mortgage, and subsequently the plaintiffs filed a bill seeking to have the charge for their maintenance enforced against the mortgage estate:

Held, [reversing the finding of the Master at Hamilton] that the loan company were, under the circumstances, entitled to priority over the plaintiffs to the extent of the amount secured by *M.*'s mortgage.

The plaintiffs filed their bill to enforce a charge upon the land in question for maintenance. The defendants

Statement.

(a) 20 Beav. 332.

(b) 3 Giff. 629.

1881. The *Anglo Canadian Mortgage Company* claimed priority to the plaintiffs' claim.

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The land had been originally owned by *James Stewart* who in 1854 mortgaged it to one *Luke Mullock*.

Stewart afterwards died, and the equity of redemption descended to his heiress-at-law *Catherine* wife of *Peter Fraser*.

By a post nuptial settlement made in 1870, *Catherine* and *Peter Fraser* conveyed the equity of redemption to trustees and charged the same with the maintenance of the plaintiffs. Subject to this charge for maintenance and the *Mullock* mortgage the lands by the settlement were on the death of *Catherine* limited to *Peter Fraser* in fee.

In 1873 *Peter Fraser* entered into an agreement with *Mullock* the mortgagee extending the time for payment of the mortgage and upon payment of the mortgage debt by the time thereby named *Mullock* agreed to discharge the mortgage. The amount due statement. appeared to have been paid by *Peter Fraser* before the 15th September, 1875, but the mortgage was not discharged.

In December, 1875, *Peter Fraser* sold the land to the defendant *William Fraser*, and conveyed to him the equity of redemption, and at the same time procured *Mullock* to assign his mortgage to *William Fraser* and convey to him the legal estate. This assignment recited that the payments from time to time made by *Peter Fraser* to *Mullock* had been advanced by *William Fraser*, and that *Peter Fraser* had requested *Mullock* to assign the mortgage to *William Fraser*. On 1st March, 1877, *William Fraser* mortgaged the land to *The Anglo Canadian Mortgage Company*, but no assignment was made of the *Mullock* mortgage.

The Master at Hamilton found that the plaintiffs under these circumstances were entitled to priority over the claim of *The Anglo Canadian Mortgage Company*. From this finding the Company appealed.

Mr. Teetzel, for the appellants. The payment by *Peter Fraser* of the *Mullock* mortgage must be presumed to have been made for his own benefit. That mortgage had not been made by him, nor was he under any liability to pay it. No presumption of merger therefore arose: *Hart v. McQuesten* (a). Whatever right *Peter Fraser* had, by reason of paying off the *Mullock* mortgage, passed to *William Fraser*. It was not necessary for *William Fraser* expressly to assign the mortgage in order to keep the charge alive in favor of the appellants. The transfer of the land passed the right to the debt: *Fisher on Mortgages*, 6. He conveyed whatever interest he had in the land to the appellants and they were entitled to hold the land charged with the *Mullock* mortgage as a subsisting charge as against the plaintiffs. Besides, the appellants were justified in relying on the recital in the assignment from *Mullock* to *William Fraser*.

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Mr. *F. B. Robertson*, for the plaintiffs. The recitals in the assignment cannot affect the plaintiffs' rights. They are shewn by the company's own witness to be false, and the plaintiffs are in no way responsible for them. The ground that the company are *bonâ fide* purchasers without notice is now taken for the first time. It is not taken even in the notice of appeal and should not be allowed to be taken now. The decision of the Master, on the evidence and the ground taken in his office, is right. The evidence shews that *Peter Fraser* had paid off the *Mullock* mortgage with his own money some time before *William Fraser* agreed to buy the lot, and before he paid any money whatever on the faith of it. And when *Peter Fraser* paid that mortgage it was dead, and the mortgagee held the legal estate as trustee for all interested in the inheritance. By the agreement of 1873 *Peter Fraser* had made the

Argument.

(a) 22 Gr. 133.

1881.

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mortgage debt his own so completely that under the law as it was before *Locke King's Act* his heir would have been entitled to have the land exonerated from it out of the personal estate: *Earl of Oxford v. Lord Rodney (a)*, *Woods v. Huntingdon (b)*, *Barry v. Harding (c)*. The cases cited for the defendants do not apply where the owner of the equity of redemption pays off the first of two incumbrances, both of which are his own debts, or the second of which was created by himself, the first being his own debt. In such case he cannot keep the first charge alive after he has paid it for two reasons: first, because as here he cannot be allowed to do so to prejudice the second charge which he himself has created; and secondly, because when he paid off his own debt, as here it necessarily sank into the inheritance for the benefit of all interested in the inheritance: *Otter v. Lord Vaux (d)*, *Johnston v. Webster (e)*, *Allen v. Knight (f)*, *Fisher on Mortgages*, sec. 1303; *Lewin on Trusts*, ch. 26 sec. 4, s.s. 9 7th ed. p.

Argument.

622. *William Fraser* had constructive notice of these facts before he made his bargain or paid his money, and if the company had made inquiry in the proper quarter, as they were bound to do, if they meant to rely on the *Mullock* mortgage to give them priority over the plaintiffs, they also would have discovered the facts. They had no right to rely on the recitals in the assignment as against the plaintiffs. And they did not in fact rely upon the *Mullock* mortgage as giving them priority over the plaintiffs. On the contrary they merged it by taking their own mortgage in simple form without mentioning the *Mullock* mortgage, and without taking any assignment of it or of the mortgage debt under it: *Tyler v. Lake (g)*. If the *Mullock* mortgage debt is not merged it has never

(a) 14 Ves. 417.

(c) 1 J. & L. 485-6.

(c) 4 D. M. & G. 474.

(g) 4 Sim. 351.

(b) 3 Ves. 128.

(d) 2 K. & J. 650.

(f) 5 Hare 272.

passed to the company. If it is merged it cannot give them priority. 1881.

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June 1st.

BOYD, C.—I feel compelled to differ from the Master's placing of the parties in regard to priority. The registered title shews that the legal estate is outstanding under a mortgage made by the owner *Stewart*, in 1854, to one *Mullock*. Subject to that first incumbrance the property descended to *Catherine Jane Fraser*, who with her husband *Peter Fraser* united in the settlement of 1870, whereby on the death of the wife the estate was to go to the husband *Peter Fraser* charged with the maintenance of their children, the present plaintiffs. The wife dying shortly after, the equity of redemption was conveyed by the husband subject to the charges. Next by arrangement between *Peter Fraser* and his brother *William Fraser*, the mortgagee assigns his mortgage upon a statement as recited in the instrument that the mortgage moneys had been paid out of the funds of *William* and contemporaneously therewith *Peter* conveys the equity of redemption to *William Fraser*, who thus becomes seised of the whole estate with the charge intervening, so to speak, between the legal and equitable estate. Then *William* mortgages in fee to *The Anglo-Canadian Mortgage Co.* to secure an advance of \$450 some two years after. I was at first impressed with the fact that no assignment was made to the company of the *Mullock* mortgage, and that the right of priority inhered in that instrument; and to that view the case of *Medley v. Horton* (a), lends some favour. But a perusal of *Phillips v. Gutteridge* (b) shews that unless the distinction between the two cases is that the latter dealt with a legal estate and the former did not, then the earlier case is not to be followed. In *Phillips v. Gutteridge*, as here, the legal estate passed to the claimant for priority, and as here no instrument was executed Judgment.

(a) 14 Sim. 222.

(b) 4 DeG. & J. 531.

1881. transferring the debt. The Court said the conveying might have been better, but that the existence of the debts independently as debts was not essential to the security. The decision was rested chiefly on this ground that the mortgagees holding the legal estate had a right to hold till both debts were paid: See *Dart*, V. & P. vol. ii, p. 840.

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Judgment.

Applying the principle of decision in that case to the present: the legal estate in the *Mullock* mortgage assigned to *William Fraser*, he was entitled to hold till paid the debt represented by that security and to hold in priority to the plaintiffs. That privilege was transmitted to the *Anglo-Canadian Mortgage Company* when he executed a mortgage to them in fee to the same extent as he had it under the *Mullock* mortgage. The company would probably be entitled under the covenant for further assurance to have an assignment of this mortgage: *Edinburgh Life Assurance Company v. Allen (a)*. But without this the conclusion is thus reached that the company are entitled to hold the legal estate till they are paid so much as is represented by the *Mullock* mortgage, unless a smaller sum is due to them.

It is immaterial in my view of the case to consider upon the evidence what the actual fact may be as to whether the mortgage money was paid to *Mullock* by *Peter* or *William Fraser*. The company hold by a registered title and are not affected by anything in conflict with what is registered unless brought to their notice. Whatever the actual facts may be, it is evident on the abstract that there was an intention on the part of both brothers to keep the mortgage from being discharged or extinguished so that it might retain priority over the charge for maintenance.

I am not sure that the allowance of either ground of appeal will exactly shew what my conclusion is, and perhaps a special order had better be drawn.

1881.


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 v.
 Holland.

COURT V. HOLLAND.

Mortgagor and mortgagee—Assignment of mortgage subject to equities—Occupation rent—Puisne incumbrancer.

A mortgagor and mortgagee dealt together for some years without having had any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off, in favour of the mortgagor for the balance due him on their general dealings.

Held,—affirming the finding of the Master—that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity.

As between mortgagor and mortgagee, there is nothing to prevent the mortgagee taking possession at a fair and reasonable rent agreed upon between them. In such a case the mortgagee is not a “mortgagee in possession” in the technical sense of the term.

In such a case, however, a subsequent incumbrancer—prior to the first mortgagee; entering into possession—is not bound by such an arrangement; and the Master may charge the first mortgagee with a fair occupation rent although it exceeds that stipulated for.

This was a suit for redemption by the official assignee of *J. & R. O'Neill*, who had been carrying on business as merchants at Port Hope. Shortly after the failure of the *O'Neills*, the defendant *Holland* obtained an assignment of two mortgages created by them in favour of one *Walsh*, each securing the payment of \$5,000 and interest. In proceeding in the Master's Office under the decree, the Master allowed as against the defendant, several sums which had been collected by *Walsh* for the *O'Neills* and not remitted to them; and had also charged as against the defendant a larger rental of certain of the mortgage premises occupied by *Walsh*, than the rental agreed upon between *Walsh* and the *O'Neills*, upon his entering into possession, the defendant *Doran*, who was a mortgagee of the same property subsequent to the mortgage in favour of *Walsh*, but prior to *Walsh* entering into possession, insisting that the sum agreed upon between them as a rental was too low. Statement.

1881. The defendant *Holland* appealed from the findings of the Master, on the grounds stated in the judgment.

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Mr. *Rae*, for the appeal.

Mr. *Maclennan*, Q. C., and Mr. *Riordan*, for the plaintiff, and Mr. *Black* for the defendant *Doran*, contra.

June 1st. BOYD, C.—I have perused the evidence, and am confirmed in the opinion I expressed at the argument, that the Master has rightly laid down the principles on which the mortgage account, in respect of the two *Walsh* mortgages, should be taken in his office. *Walsh* by his answer asks, by way of cross-relief, for foreclosure against the other parties. Upon the reference the Master is empowered by the General Orders, in taking accounts, to report as to all matters relating thereto as fully as if the same had been specifically referred.

Judgment.

Now, in asking foreclosure, *Walsh* is practically seeking that he may be paid what is due upon the mortgages, and it is familiar law that any claim existing at the date of assignment, which would form the subject of a set-off in a common law action on the covenant, may be off-set by the mortgagor or his assignee against the mortgagee or his assignee. The policy of the law is, to work out all matters in one suit, and if the measure of relief which was awarded in *Dodd v. Lydall* (a), and in *Clark v. Cort* (b), could be given under the old practice, *a fortiori*, since the Administration of Justice Act, can the Master do what he proposes in the present case?

I find by the evidence that the mortgagors and mortgagee are hopelessly at variance both with each other and with themselves on points which it was all

(a) 1 Hare, 333.

(b) 1 Cr. & Ph. 154.

important for Mr. *Rae* to establish to sustain his appeal. Mr. *Rae's* contention was, that the moneys collected by *Walsh* for the *O'Neills*, in respect of book accounts, and other debts and rents of the mortgaged premises, were remitted by *Walsh* to the *O'Neills*, and appropriated by them to the payment of goods ordered by *Walsh* from them; and having been so appropriated cannot now be diverted by the plaintiff or the Court so as to reduce the mortgage account. There are several answers to this. First of all, both parties are quite distinct upon this, that they never had any settlement of accounts in regard to their different transactions. Next, both parties, after many fluctuations, agree in this, that no statement was ever sent from *Walsh* to *O'Neill* shewing what he collected for accounts and debts, and for rents, and that no remittances were made of moneys purporting to be the proceeds of such collections. On the contrary, the moneys collected by *Walsh* were mixed with his own, and remitted as his own for the purpose of paying for the goods supplied to him from time to time by the *O'Neills*. Upon this state of facts, I take it, no questions can arise as to the rents and moneys collected for the *O'Neills* being paid to them, and the doctrine of appropriation of payments has no application. But if it had, it would only change the formal, not the substantial part of the dealing, so that if Mr. *Rae's* argument be adopted, it would leave *Walsh* largely indebted to the *O'Neills* on account of goods supplied, and the right of set-off would accrue to the same extent and for the same amount on that branch of the dealings between the parties.

The fair result of the evidence, so far as taken, appears to me to shew that large collections were made by *Walsh* as agent for the *O'Neills*, which he should have remitted to them but failed to do, and for which the *O'Neills*, before their insolvency, had a perfect cause of action on contract, and which form a debt capable

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of being set-off against the debt due on the mortgages. There being no settlement of accounts between mortgagors and mortgagee, and there being no agreement between mortgagors and mortgagee to forego this right of set-off, and no course of dealing to that effect established, then upon the insolvency of the *O'Neills* all their rights to call for a settlement of accounts and to insist upon their right of set-off passed to the official assignee, the present plaintiff. The statements made after their insolvency by the *O'Neills* to Mr. *Holland*, and on faith of which, it is said, he took a derivative mortgage of the two mortgages from *Walsh*, cannot affect the then vested rights of the official assignee. The assignment, therefore, of the mortgages to the appellant passed them to him, subject to all rights and equities affecting the state of the accounts, and the claim to off-set any debts due by the mortgagee to the mortgagors. The appeal was argued before me on the footing of these mortgages being choses in action, and I see nothing in the evidence or documents laid before me to prevent the application of the R. S. O., ch. 116, sec. 10, which was in force prior to the assignment of the securities to *Holland*.

Judgment

Mr. *Rae* cited a good many United States decisions. There is one which is very much like the present case in its circumstances, and in which the decision is as I take the law to be—*Rosevelt v. Niagara Bank* (a), which was recognized as law by *Walworth, C.*, in *Chapman v. Robertson* (b). The same doctrine is substantially laid down in *Matthews v. Wallwyn* (c), and *Norrish v. Marshall* (d), where it is said: “The principle is, that as against an assignee without notice, the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way

(a) Hopk. R. 653.

(c) 4 Ves. 118.

(b) 6 Page 627.

(d) 5 Mad. at 481.

of set-off or mutual credit as against the mortgagee, he can claim equally against the assignee."

The Master has not held that *Walsh* is chargeable as a mortgagee in possession, except as to the two stores occupied by him. He declares, as to the rents of the rest of the property, that whatever was received by *Walsh* as agent of the *O'Neills*, and not properly accounted for, is now claimable as a set-off by the assignee of the *O'Neills*.

As to the part of the property occupied by *Walsh*, I think that the Master is not limited to the amount fixed, or alleged to be fixed, between *Walsh* and the *O'Neills* as the rent. He can charge more than this if he finds that it is not a proper occupation rent. The transaction here affects not merely the mortgagors and their assignee, who would probably be bound by such an arrangement, but it is objected to by a subsequent incumbrancer, *Doran*, whose mortgage was in existence prior to the going into possession of *Walsh*. *Doran* was not a party to the fixing of the amount of rent, and is not bound thereby.

As between mortgagor and mortgagee there is no hard and fast rule which prevents the mortgagee from taking possession of the premises mortgaged at a fair and reasonable rent fixed by agreement between them. In such a case this will ordinarily be the measure of liability, because the mortgagee is then in possession, not technically as a "mortgagee in possession" by virtue of his mortgage title, but as under the special agreement: *Murray v. O'Dea* (a).

Other considerations obtain, however, when at the time of such an arrangement there is a subsequent mortgagee of the premises who has not assented to the dealing between the first mortgagee and the mortgagor. This subsequent incumbrancer is not bound by the transaction, and can claim to have such a rent

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(a) 1 B. & B. at 117.

1881. charged as would be a proper occupation rent chargeable against a mortgagee in possession. The reason for this distinction is plain; the mortgagor cannot make any arrangement for the *quantum* of rent which would derogate from the right of the subsequent incumbrancer to reduce the prior security by the amount of a fair occupation rent: *Gregg v. Arrott (a)*.

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Judgment. The Master has formed his judgment in this case, that the rent fixed between the mortgagor and mortgagee is less than the fair occupation rent. He is not wrong in principle, and it was not argued before me that he is wrong upon the facts as to the amount he fixes.

My conclusion is, that all the grounds of appeal should be overruled, with costs.

1881.

FOSTER V. MORDEN.

Chattel mortgage—Stock-in-trade—Receiver.

The plaintiff, carrying on the business of a druggist, mortgaged his stock in trade to the defendant ; the instrument by which it was effected, stipulating that the defendant should take possession of the stock and premises, to hold for four months in order to secure re-payment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the money being expended by the defendant with the assent of the plaintiff ; other money being part of the profits of the business were thus reinvested in new stock ; some of the old stock remaining in specie. The matter was referred to the Master at Belleville, to take the accounts of the dealings between the parties. Before the master made his report, the plaintiff applied on petition for the appointment of a Receiver, on the ground that the mortgage had been paid in full.

Held, (1) that as the new stock belonged to the mortgagee himself and the plaintiff could therefore have no claim upon it, and as the Master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a Receiver ; (2) that although the defendant's right on default, was to sell the original stock *en bloc* after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate ; and so long as the plaintiff chose to allow the business to go on under the defendant's control, he had the right so to conduct it, subject to being called on to account.

The plaintiff carried on the business of a druggist and dealer in general fancy goods in the town of Picton. In August, 1879, he was in financial difficulty, and applied to the defendant to assist him. By an agreement in writing, the plaintiff assigned and transferred the business and the equity of redemption of the premises in which the business was carried on to the defendant, as security for the sum of \$4,500 and interest at ten per cent. It was provided that the defendant should have the possession and control of the business for four months, by the end of which time, the plaintiff was to repay the defendant the amount so advanced. It was

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also provided that, if the said money and interest should not be paid by the time limited, the party of the first part, (the defendant) was "to have undisturbed and peaceable possession of the said stock and premises, with all the goods and merchandise, * * * The party of the first part purposes and agrees to carry on the said business during the said term, with the means and facilities the reduced state of the stock will admit at the time of the transfer; that is, the party of the first part does not agree to add capital, but to use such proceeds of sales as may be realized out of the present stock—the proceeds realized after the ordinary expenses are defrayed, to be used in making such addition to the stock, as in his opinion, is necessary; and then as the party of the first part, in his own judgment, apportion from time to time, the same to cancel or reduce in proportion the amount so loaned the party of the second part agrees to accept the premises and stock at the expiration of the four months, subject to all the change that may have taken place through selling, wear, and tear."

Statement.

It was also provided that the plaintiff should not carry on a similar business in Picton, so long as the defendant had an interest in the business. And, also, that after sufficient money had been realized from "the aforesaid sales" to liquidate the note of one Johnston, (which was included in the defendant's claim) and the current expenses, the balance should be applied in reducing the liabilities of the plaintiff.

The defendant went into possession of the business and carried the same on. The plaintiff did not redeem within the four months, and the defendant continued still to carry on the business.

It appeared on the evidence used on the present application that, (with a small exception) the defendant expended the proceeds of sales after paying expenses in the purchase of new goods; and also expended his own money in the purchase of new goods, and that at

the time of the application, the business was of greater value than when defendant took possession, and some of the original stock was still undisposed of. In consequence of the course adopted by the defendant, his debt had not been paid. In February, 1880, the plaintiff filed a bill for redemption and account, and in April, 1880, a decree was made by which the Master at Belleville was ordered to take the accounts between the plaintiff and defendant. After the accounts had been filed, and before the Master had proceeded on them, he (the Master) held that the defendant was only entitled to expend the *profits* on, and not the *proceeds* of the sales in the purchase of new goods, and that accordingly the defendant's claim had been paid. The Master gave the plaintiff a certificate in the following words: "Taking the figures as they appear upon the accounts filed, and making a calculation therefrom upon the basis that defendant was entitled at the most to expend the profits of the business in new purchases, which I have held to be the proper construction of the agreement, and which I have allowed for the purposes of calculation, at thirty-three and one-third per cent. it would appear that the defendant had, by the end of January, 1881, been repaid all his claim against the plaintiff and the business." Upon the strength of this certificate, the plaintiff presented a petition to the Court in which he asked that possession of the business might at once be given to him; or that a Receiver might be appointed. This petition was opposed by the defendant.

The defendant also appealed from the certificate, and the appeal and petition were heard together.

Mr. *Arnoldi*, for plaintiff. The certificate and accounts shew that the defendant has been paid. He had no right to expend more than the profits in new purchases, and had no right to expend his own money at all, or to improve the business so as

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to render the plaintiff's right to redeem more onerous. On the basis that he had only the right to use the profits, the defendant, according to his own accounts, has been paid, and the plaintiff is entitled to have possession of the business restored to him. It was the defendant's duty to have sold the stock and repaid himself, and he cannot by expending the proceeds in the purchase of new goods, say he has not been paid, for the proceeds exceed his debt and the expenses. In any event the plaintiff is entitled to a Receiver, because the defendant shews that he is increasing the liability of the plaintiff, and if he continues in the future as in the past, the right to redeem will be more onerous still.

Mr. *A. Hoskin*, Q. C., for defendant. The Master's certificate was improperly given. It was his duty to investigate the accounts and ascertain the position of the parties, and then report the result, and not find a result based on assumptions only.

Argument.

The Master erred in the construction of the agreement. The word "proceeds" and not "profits" is used, and the defendant is expressly empowered to expend the proceeds. The defendant was not confined to the four months, for as the agreement did not provide for the conduct of the business after the four months, the defendant was entitled to carry it on upon the terms of the agreement. The provisions as to the purchase of new stock and the application of the proceeds towards the liquidation of defendant's debt, must be read together, and the defendant had the option to apply the proceeds in either way. The accounts shew that the defendant has not been paid his claim. What he has done is to put the proceeds of sales back into the business. The business now represents, by what remains of the old stock and the new goods purchased with proceeds of sales of original stock, the same business the plaintiff gave the defendant possession of with

the addition of goods purchased with the defendant's own money. As a fact, the defendant's claim has not been paid. It is still due, and what the plaintiff is entitled to is the business of the value he gave the defendant (less expenses, wear and tear, &c.,) after payment of defendant's claim. He has no right to the goods defendant has purchased with his own money.

The plaintiff has mistaken his position, and has failed to shew that the defendant's claim has been paid. Defendant is in possession under an agreement, and before he can be put out the plaintiff must shew beyond doubt that he has been paid. The plaintiff makes no case for a receiver, for he shews himself that the business is of greater value, therefore he can sustain no loss.

Mr. *Arnoldi*, in reply.

BOYD, C.—The copy of the agreement between the parties laid before me is in some parts unintelligible, but so far as I can make it out the intention appears to be that *Morden* is to take possession of the stock in trade and the premises in question and hold them in security for four months, so as to give *Foster* an opportunity of repaying the advances made by *Morden*. It is contemplated that the business should be carried on by *Morden*, and that new stock should, in his option, be added, so as to keep up the business. The Master holds that "the defendant was only entitled, at the most, to expend the profits of the business in new purchases." I am not sure that this quite accurately defines the position of the defendant. He does not agree to add capital but to use such proceeds of sales as may be realized out of the then stock after the ordinary expenses are defrayed. But I do not see that he was disentitled to add further capital to the business if he so desired. This, of course, he could not do to the prejudice of the plaintiff, or in any such way as

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1881. to improve him out of his property. But so long as the plaintiff chose to let the business go on under *Morden's* control, both before and after default, I think *Morden* had the right to conduct it as he has done, subject always to being called to account by the plaintiff. The parties contemplated that the property mortgaged would be redeemed in four months; but no redemption took place, and thereafter *Morden* appears to have assumed that *Foster* forfeited the whole, and that he (*Morden*) was absolute owner. *Morden's* right was after default to have realized upon the whole of the chattels mortgaged by sale *en bloc* after notice; *Story*, Eq., Jur. sec. 1031. This he did not do, but went on with the concern as before, disposing of the stock in the ordinary manner of business. In the absence of complaint on the plaintiff's part, I think he had a right so to carry on the business and dispose of the stock by sales till he was paid in full *Cook v. Thomas (a)*. He was allowed to use the proceeds of the business after deducting working expenses in supplying new goods to keep up the stock. This term could, I think, be imported into the prosecution of the business by *Morden* subsequent to the default, *Blyth v. Carpenter (b)*. In effect then, by prosecuting the business, *Morden* was paying himself *pro tanto* by means of the profits of all sales of the original and the substituted stock of goods. Whether he is paid in full or not, is the question for the Master to ascertain. If he is paid in full, then *Foster* is entitled to possession, and a re-delivery of the original stock still in specie. If he is not paid in full, *Morden* is entitled to have the residue of that original stock sold, and to receive the proceeds till he is paid in full.

Judgment.

These considerations suggest that a separation is to be made between the original stock, including the stock properly and reasonably substituted therefor

(a) 24 W. R. 427.

(b) L. R. 2 Eq. 501, 606

under the agreement as I have construed it, and other stock bought by *Morden* out of his own capital, or out of profits properly applicable in reducing *Foster's* debt to him. This last stock is the property of *Morden* personally, and the plaintiff can have no claim thereon as he seems to indicate, by asking that a Receiver should be appointed. No doubt the mortgagee by prosecuting the business as he has done, has placed himself in a very embarrassing position, which is not lessened by the fact that his accounts appear to be badly kept.

Still I see no difficulty that may not be overcome in the Master's office, as remarked by Sir *James Collville*, in *Webster v. Power (a)*, a case in some respects not unlike this: "It seems to be premature to assume that the Master will not be able to come to a conclusion upon the matter referred to him by direct evidence." This petition invites me to anticipate the Master's report, and to interpose a summary remedy by the appointment of a Receiver. This course is without precedent, and would be in the present case without justification, for the reasons I mentioned during the argument, as well as others indicated in the foregoing remarks. This application is almost entirely based on the certificate of the Master, which I think does not apply to the manner of dealing between the parties. There is no evidence of any spoliation of the chattels by the mortgagee, or of any irresponsibility on his part which might call for immediate action. On the contrary he is in possession of a valuable stock* of drugs, worth at least some \$10,000, on which there is only a liability of \$1,300.

I have given my views, more at large than is perhaps necessary, but the parties expressed a desire to have the principles indicated on which the accounts as to the stock are to be taken. The evidence shews that

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Foster
v.
Morden.

Judgment.

(a) L. R. 2 P. C. 82.

1881. with the planitiff's assent some capital was expended by *Morden*, in replenishing the stock and also that a considerable part of the old *Foster* stock is still on hand in specie. These two facts render it perfectly plain that the mode of taking the accounts suggested by the Master in his certificate section three, (the result of which would be that the defendant had been paid in full,) is one that cannot properly be adopted in the present case.

Judgment.

The defendant through his solicitors seems to have occasioned the making of the certificate now in appeal and for this reason I set it aside, without costs. The petition I dismiss, with costs.

PIERCE V. CANAVAN.

Mortgagor and mortgagee—Assignment of mortgage—Estoppel—Equity of redemption.

On proceeding with the reference under the decree pronounced on the hearing as reported at *ante* vol. xxviii, page 356, the Master by his report found that there was due to the plaintiff \$1,104.99, which included a sum of \$171.32 costs incurred in the suit brought by him to redeem :

Held, on appeal,—[affirming the report of the Master]—(1) that the plaintiff was entitled to claim the costs so incurred, that proceeding having been taken in reality in defence of his rights as owner of an equity of redemption with the concurrence of *C.*, through whom the appellant claimed—and, (2) that neither of the defendants could dispute the findings in that suit, but were estopped from questioning the amount found due therein to the same extent as *Jarvis* under whom they claimed would have been, the proceeding being not in respect of a matter collateral to the mortgage in question in that suit, but virtually upon the same instrument, and that therefore the rule as to estoppel by deed applied.

The facts giving rise to this suit appear in the report thereof, *ante* vol. xxviii, page 356. The grounds of the present appeal are clearly stated in the judgment.

Mr. *J. H. Ferguson*, for the appellant.

Mr. *J. R. Roaf*, for the respondent.

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Pierce
v.
Canavan.

June 30th.

FERGUSON, V. C.—This is an appeal by the defendant *Canavan* from the report of the Master in Ordinary, bearing date the 10th day of May last. Two parcels of land known as lots *D.* and *E.*, on Courtwright street, in the town of Victoria, were embraced in a mortgage from one *Beales* to Mr. *S. M. Jarvis*, for the sum of \$500. This mortgage bears date the 9th day of April, 1873, and was by an assignment bearing date the 17th day of November, 1873, together with a number of other mortgages assigned by *Jarvis* to *James Fraser*, secretary and treasurer of the Metropolitan Permanent Building Society. In this assignment there is contained a covenant in these words: “And the said assignor covenants with the said assignee that the said mortgages are good, valid, and subsisting securities for the sums of money in each of the said mortgages mentioned as being secured thereby, or intended so to be.”

The mortgage above mentioned (upon these two lots) afterwards came into the hands of Mr. *R. G. Barrett*. The plaintiff became the owner of the equity of redemption in lot *D.*, and the defendant *Caston* became the owner of the equity of redemption in lot *E.*, which he afterwards, and on the 22nd day of August, 1879, conveyed to the defendant *Canavan*. Judgment.

In the month of February, 1878, *Barrett* served a formal notice of his intention to exercise the power of sale contained in the mortgage, for the purpose of realizing the money and interest owing upon the mortgage.

The plaintiff, it is said, being under the impression that the mortgage had been paid off, or that there was little if anything owing upon it, filed a bill against *Barrett* for redemption.

In that suit it was found there was a large sum due upon the mortgage for principal and interest, which sum together with the costs of the suit, the plaintiff paid. The plaintiff then brought this suit against the defen-

1881. dants as successive owners of the equity of redemption in lot *E*.

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Canavan.

By the decree in this suit it was declared that lot *E*. was primarily liable for the satisfaction of the mortgage debt, and it appearing that the plaintiff had paid off and discharged the mortgage, and it being alleged that the amount paid by the plaintiff in discharge of the mortgage was in excess of the sum actually due thereon, and the defendant desiring that an account should be taken, it was by the decree referred to the Master to inquire and state what, if anything, was due and owing to the plaintiff for and in respect of moneys properly paid by him in discharge of the said mortgage, and also what amount, if any, was due to the plaintiff for and in respect of the costs incurred by him in the suit brought to redeem the mortgage.

Judgment.

The Master by his report has found that there is due and owing to the plaintiff for moneys properly paid by him in discharge of the mortgage for principal the sum of \$874.12, and for interest to the date of the report the sum of \$59.55, and for and in respect of costs incurred by him in the suit brought to redeem the mortgage the sum of \$171.32, which sums added together make \$1,104.99. From this report the defendant *Canavan* appeals on the grounds following :

1st. That the evidence shewed that the sum of \$125 was paid upon the mortgage prior to the assignment of it by *Jarvis*, and the defendant ought not to be estopped by the covenant of *Jarvis* contained in the assignment from setting up as against the plaintiff the payment of this sum of \$125 which was mentioned in the surcharge.

2nd. That there was sufficient evidence to prove the payment by *Jarvis* on the mortgage of the sum of \$500, also mentioned in the surcharge.

3rd. That the defendants ought not to be held liable for any costs of, or in respect of the suit brought by the plaintiff to redeem the mortgage, nor should their property be charged therewith.

The parties seem to have derived their respective titles to these lots in this way. It seems to be understood that *Beales* was the owner of both lots. He executed to *Jarvis* the mortgage as to which the contention now arises. Afterwards, and on the 22nd December, 1873, (registered same day), *Beales* conveyed the equity of redemption in both lots to *Jarvis*. On the 26th January, 1874, (registered 25th May, 1875,) *Jarvis* conveyed the equity of redemption in the east half (38 feet) of lot *D.* to one *Pratt*, and on the 24th May, 1875, (registered 25th May, 1875,) *Pratt* conveyed this equity of redemption to the plaintiff, and on the 29th of May, 1875, *Jarvis* conveyed to *Pierce*, the plaintiff, his equity of redemption in the west half of lot *D.*, (registered 4th June, 1875.) On the 11th July, 1876, (registered 15th July, 1876,) *Jarvis* conveyed to the defendant *Caston*, the equity of redemption in lot *E.*, and on the 22nd August, 1879, (registered 20th September, 1879,) the defendant *Caston* conveyed the equity of redemption in lot *E.* to the defendant *Canavan*, the appellant.

1881.
 }
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 v.
 Canavan

Judgment.

In the suit before referred to, *Pierce v. Barrett*, the present Chief Justice, then the Chancellor, on an appeal from the report of the Master held that *Jarvis* would be estopped as against the defendant *Barrett* therein from disputing that the sum of \$500 was the amount secured by the mortgage at the time of his assigning the same to *Frazer*, and that as *Pierce* derived title through *Pratt* from *Jarvis*, he was likewise estopped; and that as the \$125 was in that suit as well as in this suit claimed to have been paid before the assignment from *Jarvis* to *Frazer*, the estoppel was conclusive as to this sum. The Master has found in this case that *Pierce* having redeemed and paid off *Barrett*, he is entitled as plaintiff in this suit to stand in *Barrett's* place with respect to this estoppel, and that as the defendants *Caston* and *Canavan* derived their title from *Jarvis* in the same way as *Pierce* had done as to the other lot, they are

1881. also estopped from disputing the same fact or statement of *Jarvis*, and in this way he disposes of the question raised respecting this sum of \$125.

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Canavan.

It was contended by counsel that the estoppel in the suit of *Pierce v. Barrett*, was not proved in the Master's office. This, I think, even if it were so, is beside the question. The decision was binding upon the Master, and is binding upon me in the same manner as a decision of this Court in another case upon precisely similar facts would be. So far then as the decision on this point in *Pierce v. Barrett* goes, I am bound by it, for the facts were the same facts.

Counsel also argued that there was no privity between *Jarvis* and the defendant *Canavan*; that at the time of the assignment by *Jarvis*, he was not the owner of the equity of redemption, and that the defendant *Canavan* did not succeed to the identical estate that *Jarvis* had. On all these points I think I am virtually bound by the decision referred to.

Judgment.

It was also urged that there was no privity between the plaintiff here and the society to whom *Jarvis* assigned the mortgage. If the plaintiff succeeded to all the rights of *Barrett* (which I think he did), then I am also bound by the same decision as to this contention. Counsel further contended that the evidence shewed that the statement by *Jarvis* respecting the \$500, was a mistake, and that for this reason there was no estoppel. I do not think the evidence shews that it was such a mistake as would have that effect, if a mistake at all. The authority relied on was *Brook v. Hays (a)*; but the mistake in that case was not at all like what is said to be the mistake here. The Master of the Rolls there said: "The true meaning of the recitals is this: * * * We have retained what is necessary for the payment of legacy duty, and all that is necessary is £19.8. * * * That was a simple mistake of fact common to all parties."

(a) L. R. 6 Eq. 25.

I think such a mistake made by an executor very different in kind from the mistake contended for here.

It was further contended that there was no estoppel because the suit is not founded on the same deed that contains the alleged estoppel, and that this contention can prevail without disputing the correctness of the decision in *Pierce v. Barrett*, for there the suit was brought upon the mortgage in the assignment of which was contained the alleged estoppel. There can be no reasonable doubt that the law is that an estoppel is always in some action or proceeding based on the deed in which the fact in question is stated; and that in a collateral action or proceeding there is not an estoppel. But in my opinion this is not a suit upon such a collateral matter. The right of the plaintiff when he redeemed the mortgage and paid *Barrett* off, was to stand in *Barrett's* position, and have assigned to him all *Barrett's* interests, &c. The form of a redemption decree shews this. It was virtually upon these rights that this suit was brought. By the plaintiff's bill, it appears that the mortgage in question, and the assignment thereof, in which is contained the alleged estoppel, were considered essential to the foundation of the plaintiff's rights, and I think they were so.

I am of the opinion that the appellant fails as to this first ground of his appeal.

As to the second ground of appeal, namely, that there was sufficient evidence to prove the payment of the \$500 mentioned in the surcharge. The Master says that in his opinion the evidence goes no further than the evidence did in the former suit, *Pierce v. Barrett*, where he held it insufficient to prove the alleged payment, and his holding was upheld by the Chancellor.

I have perused the evidence bearing on this subject with, I think, the greatest care, and in doing this I have not overlooked, or neglected Exhibit 2 in the evidence of Mr. *Jarvis* about which there was contention during the argument. I have considered it with-

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Canavan.

Judgment.

1881. out reference to any former finding upon it, and I think that the most this evidence shews is, that there was a payment of \$500 made on the 2nd July, 1874: that it was made through the solicitors of the company, and that it was on account of Mr. *Jarvis's* indebtedness generally, which was a large sum, somewhere in the neighbourhood of \$10,000; that even if part of this \$500 might ultimately apply upon the mortgage in question, it is not shewn what part would so apply, nor does it anywhere appear that this money, or any part of it, was ever applied either by Mr. *Jarvis* or the company, upon this mortgage. The letter of *Glascott* of the 26th October, 1877, was evidently written in answer to an inquiry. He does not profess to have had any personal knowledge of the matter, for he says: "No money appears to have been paid," &c. The letter doubtless was written from information derived from the books, and Mr. *Frazer* says the books did not shew any application of this money, or any part of it, to this mortgage. *Glascott's* reference to the \$125, appears to me to have been occasioned by the inquiry made of him, and he virtually says that he knows nothing of it, so that this letter even if *Glascott* could bind the company by a statement made in this way, does not help the appellant. I do not think that the evidence of Mr. *Jarvis* taken either by itself or in connection with the other evidence, shews either the payment of this \$500 on account of this mortgage, or a satisfaction of the mortgage, which appears to have been contended for. I think the evidence not nearly sufficient to establish the appellant's contention in respect of the matters stated in the second ground of appeal, and I do not see how the Master could have found upon it otherwise than he did.

Judgment.

Then as to the third and last ground of appeal. Counsel for the appellant treated this branch of his appeal as if the respondent was bound to make such a case against the appellant as would entitle him in an

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action at law to recover these costs, and cited authority to support his contention that such a case was not made out. I do not think this the correct view. The prayer of the bill asks that the defendant *Caston* be ordered to pay the mortgage debt, interest, and these costs, and that in default of such payment the lands (lot *E.*) be sold, and the purchase money applied in payment of the same, and that any deficiency may be paid by *Caston*. The Master's report finds that there is due and owing to the respondent the moneys therein mentioned, that is due and owing as against the lands and upon the mortgage. Hitherto no personal order is sought against the appellant. The mortgage money and interest are a charge upon the lands in favour of the plaintiff, because he redeemed *Barrett* in whose favour they were such a charge. The respondent is in the position of an assignee of *Barrett*. These costs of the suit *Pierce v. Barrett*, became a charge in favour of *Barrett*, to be added to his mortgage money and interest. The owner of the equity of redemption in one half of the lands embraced in the mortgage, filed his bill to redeem the mortgage. In that suit the mortgagee succeeded, and I think there can be no doubt that the mortgagee was entitled to add the costs of that suit to the mortgage debt and interest. Then upon the redemption taking place, the respondent became entitled to *Barrett's* right in respect of this charge, unless he, by reckless or fraudulent conduct, or in some other way, forfeited it. There is no charge of fraud made, and the Master has found that these costs were reasonably incurred. I cannot say that this finding is erroneous, and if they were reasonably incurred, I think they should be added to the respondent's claim against the land.

There is much evidence to shew that the suit was brought with the concurrence of Mr. *Caston*, the then owner of the equity of redemption in lot *E.* The parties—the respondent and Mr. *Caston*—may not

1881.

Pierce
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Canavan.

Judgment.

1881. have then thought that their rights as between themselves were what they have been declared to be, but this does not appear to make the matter different. Mr. *Caston's* letter of May the 7th, 1879, says: "Kindly tell me how the matter stands, and to what extent Mr. *Taylor*, the Master, is against us." And in his letter of the 13th of the same month, he asks for full details of what was being done, and speaks of an opinion as to going on with the appeal. His letters of May the 19th, and 28th, 1878, also shew the position he occupied. He and the respondent were both of the opinion that the suit would be successful. *Barrett* was about proceeding to recover his money, and the suit was brought to resist his claim. I cannot say that the Master was in error on this point, on the contrary, I think he was right.

Judgment.

The result is that the appeal is dismissed, as to all three grounds, and with costs.

During the argument I was referred to the case of *The General Finance &c. Co. v. The Liberator Permanent Benefit Society (a)*, on the question of Estoppel. For reasons that I have stated, I am not in a position to consider the effect of it.

1881.

HOLWAY v. HOLWAY.

Alimony.

On an application to reduce the amount of alimony payable by the defendant to the plaintiff, the property of the defendant was variously estimated (lands and personalty) at from \$2,938 to \$6,000, and the evidence of the defendant, when cross-examined upon his affidavit filed by him in support of the motion, being unsatisfactory, the Court, [FERGUSON, V.C.,] refused to interfere with the report of the Master fixing the amount, which had been paid under such report for about eighteen months without objection; but the result of the application was not to be considered conclusive against the defendant on any other motion he should be advised to make.

This was an application by petition, under the circumstances stated in the judgment, to reduce the amount of alimony ordered to be paid to the plaintiff by the defendant.

Mr. *Doherty*, for the petitioner.

Mr. *Moss*, contra.

Cooke v. Cooke (a), *Otway v. Otway (b)*, *Deane v. Deane (c)*, *Severn v. Severn (d)*, *McCulloch v. McCulloch (e)*, *Shelford* on M. & D. 696; *Bishop* on M. & D., 4th ed., p. 450; were referred to.

FERGUSON, V. C.—This is an application by petition to have the amount of alimony payable by the defendant to the plaintiff reduced. June 30th.

The petition of the defendant states that the decree was pronounced on the 27th day of September, 1879; that it was referred to the Master at St. Thomas, to ascertain the proper amount of alimony to be allowed, and that the Master in January, 1880, fixed the amount at \$27 per month; that the defendant has since paid Judgment.

(a) 2 Phil. 40.

(b) 2 Phil. 95, 109.

(c) 1 Sw. & Tr. 90.

(d) 7 Gr. 109.

(e) 10 Gr. 320.

1881. the alimony; and that there is now none of the same in arrear.

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v.
Holway.

The petition further states that the amount is too large, and that unless the sum is reduced, the defendant will be unable to keep up the payments.

The real property of the defendant is then referred to as being a brick house and a small frame house, situate on a lot in the city of St. Thomas, on the west side of George street; and ten acres of farming land on the Edgeware road, in the township of Yarmouth; the property in the city being worth \$1,600, and the farming land worth \$600. Statements are then made as to the rents and taxes of this property.

The defendant's personal property is then stated to consist of a mortgage on which there is unpaid the sum of \$75; the sum of \$213 on deposit in the Southern Loan and Savings Company; and \$450 stock in the St. Thomas Gas Company.

Judgment. The petition also states that the defendant is seventy years old, and is troubled with rheumatism, and is so enfeebled by age and hard work as not to be fit or able to work longer; and that he has not been able to earn since the making of the decree, more than eight or ten dollars per month. The decline in the rate of interest is stated, and the petitioner says that in consequence of his being unable to rent his houses more advantageously, and of the diminution of his personal estate in paying the costs of this suit, and in keeping up the monthly payment of alimony, as well as by reason of his age and enfeebled health, he is unable to keep up the payments of \$27 per month to the plaintiff; and the prayer is, that for these reasons the amount of the alimony be reduced to such sum as may seem proper and as the petitioner may be able to pay.

This petition is verified by the affidavit of the petitioner, and supported by the affidavits of *John Pincombe*, a second affidavit of the plaintiff; affidavits of *Albert Crouse*, *Hiram Comfort*, *George Scott*, *Albert*

Hubson, Neil Dorrick, Henry Thornton, Oliver Cruise, A. M. Melbourne, and another explanatory affidavit of the petitioner, certainly having a strong tendency to shew that the petitioner cannot continue to pay the present amount of alimony and retain his property.

1881.

Holway
v.
Holway.

The petition is opposed by the affidavit of the plaintiff, stating that she is sixty-six years old; that she is infirm and taken care of by her daughter; that she would be unable to supply herself with proper food and raiment, if the amount of the alimony were reduced by any considerable sum; that she is informed and believes that the real and personal property of the petitioner are worth about \$6,000, and many other things tending to shew that the petitioner is of ability to pay the alimony at the present amount.

Against the petition is also read the affidavit of Dr. *Corlis*, the medical attendant of the plaintiff, stating that she is wholly incapable of taking care of herself; that the \$27 per month is a small allowance for her maintenance and support, and that if her daughter were to discontinue her attendance, this sum would be wholly inadequate; also, the affidavit of *John White*, stating that he has been a resident of St. Thomas for the last thirty-five years, and is well acquainted with the value of property therein; that he knows the property of the petitioner in St. Thomas; that it has not during the last three years decreased in value, but that it has increased, and is now of the value of \$2,500; that he knows this by comparing it with another property there that has been sold for a larger sum; that he knows the circumstances of the family, and that in his opinion the \$27 a month is a small allowance for the support of the plaintiff; also, the affidavit of Dr. *Wilson*, stating that he knows the petitioner and has been consulted by him; that he is afflicted with chronic rheumatism, but that it is not of a serious nature, and ought not to incapacitate him from doing a moderate day's work; also, the affidavit of *Harriet Holway*, the

Judgment.

1881. daughter of the parties, stating that she has for the last three years been constantly employed in nursing and taking care of the plaintiff; that she receives no compensation for so doing, but her food and clothing; that the \$27 per month is intrusted solely to her; that she disburses it, and that it is wholly exhausted in the maintenance of the plaintiff and herself; and that a short time ago she had a conversation with her father, and that he then stated that he was working steadily, and had more work in hand than he was able to perform; and that she then asked him regarding his health, and he said he enjoyed good health, only that he was slightly troubled with rheumatism.

Holway
v.
Holway.

Judgment.

There is also read against the petition, an affidavit of *George Hurd*, stating that he is well acquainted with the petitioner, and knows that he is the owner of some property in St. Thomas of considerable value, besides personal property; and that a short time ago he had a conversation with the petitioner, who then told him positively that he had received £500 from England, on the death of a relative of his who resided there.

The petitioner was cross-examined upon his affidavit, and was asked as to this £500, and he positively denied having received it; and also positively denied having ever said that he had received it. So that his statement and that of *George Hurd* are in direct conflict. On this cross-examination, the petitioner was also asked how much money he had on mortgage, and he answered by saying that he did not know how much he had because the mortgages were in the hands of his solicitor. This answer was, to my mind, not satisfactory, and no effort appears to have been made to explain it or to shew how the fact is in regard to the mortgages spoken of. It may be, however, that there has been a misconception or a mistake as to the £500, and that the petitioner's unsatisfactory answers respecting his mortgages, were the result of a want of know-

ledge, and a proper appreciation of his position as a petitioner to this Court, rather than of a desire to conceal or deceive.

1881.

Holway
v.
Holway.

The decree in the cause is against the petitioner. It must now be assumed that he was the party at fault. There is strong evidence before me shewing that the whole amount of the alimony at present is absolutely necessary for the maintenance of his wife who is sick and unable to take care of herself, and this evidence is wholly uncontradicted. It is only about eighteen months since the Master made his report as to the proper amount of alimony to be allowed and paid. This report was not appealed from, and I think I must, for the purposes of this application, consider that the sum allowed was then correct. The petitioner says that his personal property has since been diminished by the payment of the costs of this suit which must have been for the most part, if not altogether, incurred before the making of the Master's report, and by the payment, hitherto of the alimony. It has not been shewn to me on what evidence the Master made his report, and I do not know whether he took those costs into account in estimating the alimony to be paid. The evidence touching the value and the alleged depreciation of the petitioner's property, is seriously conflicting. I have examined all the authorities referred to, and some more. The principles on which the Court should proceed in a matter of this kind, are not at all obscure, so far as the law is concerned. Any difficulty I feel is in regard to the exercise of a proper judicial discretion. I cannot avoid being impressed more or less against the petitioner by the statement respecting the £500, and his answer respecting the amount of his mortgages. After having read the affidavits more than once, and given the application some anxious consideration, I have arrived at the conclusion that under all the circumstances my duty is not to interfere with the alimony as it is at present. Under such a conflict of

Judgment.

1881. testimony regarding matters so very material to the application and the other circumstances that weigh more or less against the petitioner, I do not see my way to any course except to dismiss the application, and the dismissal must be, I apprehend, with costs.

Judgment. Thinking, however, that there may have been a want of wisdom on the part of the petitioner, rather than an actual and fatal frailty in his case, I desire to say that the result of this application should not, in my judgment, be considered to be in any manner conclusive against him in any future application he may be advised to make.

PLATT v. BLIZZARD.

Specific performance—Misrepresentation—Costs.

In a suit for specific performance, the defendant set up that the reason he had refused to complete the agreement was, that he had been induced to enter into it by certain misrepresentations of the plaintiff, but which he entirely failed in proving. Although the Master reported that a good title was first shewn in his office, the decree on further directions ordered the costs to be paid by the defendant, notwithstanding that the bill contained certain statements which it was alleged were not true, and had not been proved, the Court being of opinion that such statements had not any material bearing upon the case, and that a suit would have been necessary without reference to the question of title.

Motion for decree for specific performance, for the purchase and sale of lands, under the circumstances stated in the judgment.

Mr. *Moss*, for the plaintiff.

Mr. *W. Cassels*, for the defendant.

June 30th. JUDGMENT. FERGUSON, V. C.—The bill in this case was filed for the specific performance of an agreement for the purchase and sale of land.

The defendant by his answer set up certain alleged misrepresentations of the plaintiff, whereby he was induced to sign the agreement. The answer stated plainly that the defendant had refused to carry out the agreement, and that this was the defendant's reason for so doing, and submitted that the plaintiff was not entitled to specific performance. At the hearing of the cause at Cobourg, in April, 1879, a decree was pronounced in the plaintiff's favour, and there was the usual reference to the Master as to the title of the land, the subject of the contract. Further directions and the question of costs were reserved. The case now comes before the Court on further directions. The Master has reported that a good title to the lands was first shewn in his office, and it is now contended on behalf of the defendant that the usual rule applies and that he is entitled to the costs of the cause. It is admitted that the question of costs is the only one in respect of which there is any difference. It is contended on behalf of the plaintiff that the usual rule does not apply, and that as the litigation was really about a matter other than the question of title, as to which the plaintiff has succeeded and the defendant entirely failed, the plaintiff is entitled to the costs of the cause. On behalf of the plaintiff the cases of *Haggart v. Quack-enbush* (a), and *Graham v. Stephens* (b), are referred to, as also *Seton* on Decrees, 1297 and 1299. The defendant relies on the rule as stated in *Morgan and Davey*, p. 180, and the cases there referred to.

In the case of *Graham v. Stephens* the present Chief Justice, then the Chancellor, adopted the rule stated in the case of *Monro v. Taylor* (c), and in the same case in appeal (d), as the proper rule in such cases as the present one, that is, "In deciding who shall pay the costs of the suit the Court must inquire by whom and by what the litigation was occasioned."

(a) 14 Gr. 701.
(c) 8 Hare. 70.

(b) 27 Gr. 434.
(d) 3 McN. & G. 725.

1881.

Platt
v.
Blizzard.

Judgment.

1881. And the learned Chief Justice also quotes this language of Lord Truro, in the case in appeal: "With regard to the costs, even supposing that a good title was not shewn till the attested copy of the lease of 1810 was left in the Master's office, I agree * * * that the same kind of litigation would have arisen even if this lease had been produced before the filing of the bill, and that therefore the plaintiff is entitled to the costs of the suit." And there are many authorities to precisely the same effect.

Platt
v.
Blizzard.

Now in looking at the case before me I cannot but think it plain, beyond reasonable doubt, that the litigation has been occasioned by the refusal by the defendant, for the reasons that he states in his answer, to carry out the contract that he had entered into. His contention is plainly stated in his answer, and in it he failed. I think the defendant caused the litigation. In this litigation the plaintiff has succeeded, and is, in my opinion, entitled to the costs of the cause.

Judgment.

It was argued on behalf of the defendant that the plaintiff had made certain statements in his bill which were not true and were not proved, and that for this reason he should not get the costs. I have examined this part of the case, and am of the opinion that such statements did not make any material difference in the suit, and that the defendant's contention in regard to them fails.

The plaintiff is entitled to the general costs of the cause, including the costs on further directions.

The decree will therefore be as asked by the plaintiff's counsel, there being nothing but costs in dispute.

If there are any such costs as are mentioned and referred to in the last paragraph of the judgment in *Haggart v. Quackenbush (a)*, the defendant will be entitled to them and to set them off against the plaintiff's costs. I am not, however, aware that there are any costs of this character.

(a) 14 Gr., at 703.

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YOUNG v. HUBER.

Injunction—Infant's rights as co-partner—Parties—Adding parties.

In a suit by an infant partner against his co-partner praying for dissolution, receiver, reference, &c., after a decree *pro confesso*, and during the taking of the accounts—under an agreement for a continuance of the partnership business for that purpose—certain creditors of the firm obtained judgments and executions at law against the partner of the infant, who was not informed of these proceedings until the sheriff had seized and was about to sell, the whole of the partnership property.

Held, on motion for injunction, that the proceedings at law were not within the provisions of R. S. O. ch. 123 sec. 8, and that the sale should be restrained.

Held, also, that the execution creditors might be made parties for that purpose on motion simply.

This was a motion for an injunction to restrain certain judgment creditors from selling partnership property under executions against an individual member of the alleged co-partnership. The bill was filed by *William John Young*, by his next friend, against *James Thornton Huber*, and *James Alexander Young*, a brother of the plaintiff. It stated that a partnership in the grocery business at Berlin, which had been in existence for some months between the plaintiff and his brother *James*, was dissolved in August, 1879; that the plaintiff having then retired, a new partnership under the name of *Huber & Young*, was formed between the defendants, and that this was dissolved in April, 1880, by the retirement of the defendant *J. A. Young*, and another partnership formed between the plaintiff and the defendant *Huber*, under the name of *Huber & Co.* The bill charged the defendant *Huber* with, amongst other acts, not carrying out the partnership agreement, and with misconduct as a partner in appropriating the moneys of the firm to his own use; the virtual exclusion of the plaintiff from his partnership rights; keeping no

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cash book; and, on these and other grounds, prayed a dissolution of the partnership, the appointment of a receiver of the property, and a winding up of the business of *Huber & Young*, and *Huber & Co.*, under the direction of the Court.

The bill was taken *pro confesso* against both defendants. The decree made on the 2nd February, 1881, dissolved the partnership, ordered a reference to the Master at Berlin to appoint a receiver, and take the partnership accounts of *Huber & Co.*, and directed that the partnership debts should be first paid by the receiver out of the estate. Further directions and costs were reserved.

Statement.

The cause (July 20th 1881) came before the Court on a motion by the plaintiff for an injunction to restrain Messrs. *Reid, Goering & Co.*, of Hamilton, wholesale grocers, and the sheriff of Waterloo, who had advertised the sale, from selling the whole of the partnership property at Berlin, under two executions which had been issued out of the County Court of Wentworth, and the Court of Common Pleas respectively, at the instance of *Reid, Goering & Co.*, on judgments obtained by them against the defendant *Huber* individually. The motion also asked the appointment, if necessary, by the Court of a receiver of the partnership effects, which was then in the custody of the sheriff; and that the sheriff should be ordered to deliver up possession to any receiver, who had been or might be appointed, or for such other order as might seem just. No mention was made in the notice of motion about adding *Reid, Goering & Co.*, as parties to the suit.

It appeared, from the affidavits filed, that the plaintiff's solicitor had, on the 26th of March previous, taken out a warrant for the appointment of a receiver, and served it on the defendant *Huber*; and that the latter not wishing a receiver appointed on account of the consequent injury to the business, promised and

agreed with the solicitor to do anything in his power to avert that proceeding. It was thereupon agreed between the solicitor and *Huber* that the partnership business should be considered as having been continued from the date of the dissolution by the Court, on the same terms as before, in so far as the original partnership agreement was concerned; that the defendant should commence, and continue keeping a cash-book, and that he should do his utmost to assist in winding up the business, under the decree, to the satisfaction of his co-partners. The taking of the accounts was then proceeded with in the Master's office, but owing to the absence of an important witness, was not completed before the commencement of the long vacation. The defendant *Huber* it was alleged had not acted in good faith in carrying out the agreement for the continuance of the partnership business, but the first intimation which either the plaintiff or his solicitor had of there being anything seriously wrong was on the 7th of July when the sheriff seized the stock-in-trade in the store, and took possession under the executions. The judgments recovered by *Reid, Goering & Co.*, were for something over \$1,000. They were for goods sold to *Huber & Co.*, and were against *Huber* alone. No intimation had been given to the plaintiff or his solicitor, of these proceedings at law, and it was suggested, in the affidavits filed by the plaintiff, that the judgments and executions were the result of a friendly arrangement between *Huber* and the plaintiffs in the actions for their mutual benefit. The agreement for the continuance of the partnership, after its dissolution by the Court, was not denied. *Huber* did deny, however, that there ever had been a partnership between himself and the plaintiff, and said that he did not feel bound to inform the plaintiff of the suits against him because he did not consider the plaintiff a partner. It was alleged and not denied, that *Reid, Goering & Co.* had, before suing *Huber*, been fully informed of all the previous pro-

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ceedings in the present Chancery suit, the particulars of the decree, the plaintiff's claim to be a partner in the firm of *Huber & Co.*, the proceedings in the Master's office, and the agreement with *Huber*, for the continuance of the partnership business. It also appeared that on the 11th July, being the day before the injunction motion was first made, a receiver had been appointed by the local Master, which was objected to at the time by the execution creditors—the appointment being made in vacation—and that the plaintiff's solicitor consented that the Master's action in this respect should be subject to the approval of the Court on the hearing of the motion. The shop, it appeared was kept open as usual after the sheriff took possession, and the plaintiff and defendant *Huber*, were assisting in the sales.

Argument.

Mr. *Moss*, and Mr. *King*, for the motion. It is admitted that if the alleged partnership between the plaintiff and defendant *Huber* is not proved, this application must fail, but the evidence establishes a partnership. *Huber* himself is precluded by the decree from denying the partnership, although his execution creditors are not. Some weight must be attached to the decree; and, although in his affidavit filed on behalf of the creditors *Huber* denies the partnership, he is contradicted, on that point, by four other persons, while he does not deny the agreement for the continuance of the partnership after its dissolution by the decree. In any event, it is only necessary that, on an interlocutory motion like this, the Court should be satisfied that a *prima facie* case is made out, although some of the material facts, may be afterwards controverted at the hearing. To obtain an injunction it is only necessary to shew that there is a substantial equitable case which ought to be decided before execution goes. *Attorney-General v. McLaughlin (a)*, *Tread-*

(a) 1 Gr. 44.

well v. Morris (a). As to seizing partnership property on execution against one partner, and as to injunction and receiver, the following authorities were referred to: *Partridge v. McIntosh (b)*, *Flintoff v. Dickson (c)*, *Taylor v. Jarvis (d)*, *Wilson et al. v. Voght (e)*, *Taylor's Equity*, secs. 512, 659, 621-23-24; *Story's Equity*, secs. 678 and 887; *Mason v. Parker (f)*. Ch. 123, sec. 8 R. S. O., is relied on to defeat this application, but that we submit does not apply to the case of an infant partner. It only applies to "any action which might be brought against one of the members of the partnership." An infant trader is not liable on his contracts: *Thornton v. Illingworth (g)*, *Good v. Harrison (h)*, and "all the members of the partnership" firm of *Huber & Co.*, could not, therefore, be sued by these creditors, although they were aware before suit that the decree provided for the payment of the partnership debts, and they could have proved their claim in the Master's office. There is some evidence of collusion between them and *Huber*. The fact that they are not parties to this suit should not prevent an order for the injunction. The objection is really technical, and to prevent expense and multiplicity of suits, the Court has been accustomed, in injunction applications, to add persons as parties to suits on motion simply. *Peterkin v. Macfarlane** is an authority on this point.

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Argument.

(a) 15 Gr. 165.

(b) 1 Gr. 50.

(c) 10 Q. B. 428.

(d) 14 Q. B. 128.

(e) 24 Q. B. 635.

(f) 16 Gr. 81.

(g) 2 B. & C. 826.

(h) 5 B. & A. 158.

* In *Peterkin v. Macfarlane*, 4 App. 25, the point here referred to is not mentioned, as the judgment proceeded on other grounds. The bill was by a married woman, as owner of certain lands, to redeem, and the decree allowed redemption. The appeal book shews that, after decree, a motion was made by the plaintiff's solicitors for an order making one *John Burke*, not a party to the suit, a party defendant thereto, and for extending against him and his brother *Thomas Burke*—one of the parties defendant, by bill—an interim injunction which had previously been granted against *Thomas Burke*. SPRAGGE,

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Mr. *Muir*, contra. The affidavits filed by the plaintiff do not prove a partnership; they are incomplete and unsatisfactory on a number of points which are necessary to establish such a relationship between the parties. *Reid, Goering & Co.*, believing there was no partnership, acted *bonâ fide* in suing *Huber*, with whom alone they dealt in supplying the goods for the price of which the action was brought. But, assuming that there was a partnership, the infant partner must be held to have accepted all the risks of his share and interest in the partnership property being seized and sold under an execution against his co-partner. If he wished to avoid that, he should have had a declaration of the co-partnership filed under the Act ch. 123, R. S. O. No declaration was filed in the present case, which, therefore, comes within the provisions of sec. 8 of that statute. In such a case that section allows an action to be brought against any one of the members of the partnership "as carrying on, or as having carried on business jointly with others, without naming such others in the writ or declaration under the name and style of their said partnership firm," and to recover judgment against, and seize and sell, the partnership stock and property. *Reid, Goering & Co.*, could not do otherwise than they did if they wished to obtain priority; they have a right to this in the present state of the law, and should not be interfered with. If there was a partnership the plaintiff was an infant and not liable at law, and he has received the benefit of the goods sued for. *Huber* was the only one who could be sued, but, as no declaration under the Act was filed, there was really no partnership, and the judgment was rightfully recovered, and the sale by the sheriff, under the executions, should

Argument.

C., made the order. One of the reasons of appeal was, that *John Burke* was so added without any proper or regular proceeding having been taken for the purpose, but that point was not decided in the Court above for the reason already stated.

not be restrained. There is no evidence of the appointment of a receiver; but, if there were, and it was shewn that he had given security, and was ready to take possession, the Court should not dispossess the sheriff to make room for him: *Defries v. Creed* (a). *Reid, Goering & Co.* cannot be restrained because they are not parties to the suit, and the notice of motion does not propose to add them as parties. It would not be just or reasonable to make them parties on a mere motion. A bill or petition should be filed against them, and an injunction moved for thereafter in the regular way.

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FERGUSON, V.C.—*Peterkin v. Macfarlane* decided by the present Chief Justice—then Chancellor—is a precedent for adding, on motion after decree, a party defendant for the purposes of an injunction. I think the question as to whether or not the plaintiff was a partner in the business referred to, is a fair question for trial; I cannot on the evidence decide that he was not a partner. Assuming that a partnership did exist, *Reid, Goering & Co.*, the execution plaintiffs at law fail, I think, to shew that the proceedings in the common law suits, are within the provisions of sec 8, ch. 123, R. S. O. These proceedings were against the defendant *Huber* simply, and it is admitted that there was nothing whatever in that suit to shew that it was brought or prosecuted for a partnership debt or liability, the assumption being then, as the contention is now, that there was no partnership.

July 21st.

Judgment.

An order will go making *Reid, Goering & Co.* parties defendants in this suit. This order will contain leave to them, notwithstanding the decree, to defend this suit in any way they may be advised, proper words for this purpose being employed in framing the order. The usual order will then go for the issue of an interim injunction restraining the sale,

(a) 11 Jur. N. S. 360.

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under the executions at law, of the property in question. As to the receiver, his appointment was referred to the local Master by the decree. The Master has acted on the reference, and I do not see that the motion brings the matter before me in such a way as enables me to act at all. There was no argument respecting the question of costs, and perhaps that had better be spoken to next Tuesday. I think it a great pity that there is so much litigation about so small an estate.

THOMSON V. THE VICTORIA MUTUAL FIRE
INSURANCE CO. ET AL.

Pleading—Demurrer—Party suing on behalf of a class.

Where a right of suit exists in a body of persons too numerous to be all made parties, the Court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of them an interest identical with that of the plaintiff. But where a mutual insurance company had established three distinct branches, in one of which, the water-works branch, the plaintiff insured, giving his promissory note or undertaking to pay \$168, and the company made an assessment on all notes and threatened suit in the Division Court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, and insisting that he and the other policy holders could be properly assessed only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the Division Courts had not the machinery necessary for that purpose.

Held, that according to the statements of the bill, the policy-holders in the water-works branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs.

The bill in this case, as amended, was by *James Thomson*, who sued on behalf of himself and all other

policy holders associated with him, as stated in the bill against *The Victoria Mutual Fire Insurance Co., Reginald Kennedy, and James M. Williams*, and set forth, after stating that the defendant company was duly incorporated, and was carrying on business in the city of Hamilton, such business being divided into three branches, that on the 7th of January, 1879, the plaintiff had effected an insurance of his property in one of such branches, the water-works branch, for \$3,500, and given his undertaking for \$168, \$21 whereof was paid in cash to secure the due payment by him of all sums that should become payable by him in respect of any assessment in respect of his said insurance. The bill further set forth that a special assessment of 25 per cent had been made on all promissory notes due in respect of insurance in the said water-works branch on the 22nd September, 1880, and that such assessment was made in order to meet certain liabilities of the company existing before the plaintiff and the other policy-holders had been insured by the company.

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Statement.

The bill further stated that the plaintiff had caused notice to be given to the company that he was ready and willing to pay his proper proportion of the losses and expenses of the water-works branch incurred during the currency of his policy; but that he objected to pay for losses and expenses incurred prior to the time of effecting his said policy; and the defendant company insisted upon payment of the full assessment, and threatened and were about to commence suit in the Division Court against the plaintiff and the other policy holders in the water-works branch who were very many in number to claim the said assessment. The prayer of the bill was that it might be declared that the plaintiff and those he represented were only liable to pay their proportion of the losses and expenses incurred and made by the company in their water-works branch during the currency of their said policies, and that they were not liable to pay any part of the losses and

1881. expenses incurred before the date thereof; an injunction to restrain proceedings at law and that an account might be taken of the amount of assessment due by the plaintiff and the other policy-holders to the defendant company on the said promissory notes given by him and them, which assessment he and they were ready to pay; and for further and other relief.

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The defendant company demurred for want of equity.

Mr. *Moss*, for the company.

Mr. *W. Cassels* and Mr. *J. R. Roaf*, contra.

Jones v. Garcia del Rio (a), *Bailey v. Birkenhead, &c., Railway Co. (b)*, *Carlyle v. South Eastern Railway Co. (c)*, *The Beaver and Toronto Mutual Insurance Co. v. Spires (d)*, *Wilson v. The Upper Canada Building Society (e)*, *Harris v. The Dry Dock Co. (f)*, *Brooke v. The Bank of Upper Canada (g)*, *Webster v. Leys (h)*.

The other facts are fully stated in the judgment.

June 30th.

FERGUSON, V. C.—The plaintiff by his bill says that he sues on behalf of himself and the other policy-holders associated with him, as hereinafter mentioned, and it is not an easy matter to ascertain with absolute certainty from the statements in the bill what policy-holders are meant by those associated with the plaintiff.

Judgment.

The bill states that the defendants are a duly incorporated mutual fire insurance company, and carrying on business in the Province of Ontario, under and subject to the provisions of chapter 161, R. S. O., entitled an Act respecting Mutual Fire Insurance Companies.

That the defendants have their head office in the

(a) 1 T. & R. 297.

(c) 1 McN. & G. 698.

(e) 12 Gr. 206.

(g) 16 Gr. 249.

(b) 12 Beav. 433.

(d) 30 U. C. C. P. 304.

(f) 7 Gr. 450.

(h) 28 Gr. 471.

city of Hamilton, and have divided their business into three branches called respectively the general branch, the Hamilton branch, and the water-works branch, and that these branches are carried on under the provisions of the said Act.

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That on or about the 7th of June, 1879, the plaintiff insured certain premises in the city of Toronto, and the contents thereof, with the defendants, in the water-works branch, for the sum of \$3,500, and in consideration gave his undertaking for the sum of \$168, (whereof \$21 was paid in cash at the time), to secure the due payment by him of all sums to become payable in respect of any assessment to be made in connection with his said insurance, which was duly accepted by the defendants, and the policy issued.

That in October last the defendants made a special assessment upon the said note or undertaking and other notes held by them of 25 per cent., being at that rate on all promissory notes due in respect of policies of insurance in the said water-works branch, on the 22nd September, 1880, and of this notice was given to the plaintiff and other policy-holders in the same month, and that the said special assessment was made in order to meet certain promissory notes of the company for a long time current, upon which the company had raised money to pay debts existing before the plaintiff and the other present policy-holders became insured, and that the plaintiff is informed and believes that the larger part, if not all of the proceeds of such notes, was applied in payment of losses and expenses of the company incurred and made prior to the time or the giving of the said promissory notes in respect of which the said assessment was made. The bill further states, in effect, that the plaintiff gave notice to the company of his readiness and willingness to pay his proper proportion of the losses and expenses of the water-works branch, incurred during the currency of his policy, and that he objected to pay for losses and

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1881. expenses incurred prior to the time of effecting his insurance, and that the company insist upon payment by the plaintiff of the full amount of the said assessment, and are about to commence suits in the Division Courts against the plaintiff and the other policy-holders in the water-works branch, who are very many in number, to collect the said assessment; that the said policy-holders in the water-works branch object to pay the said assessment for the same reason as the plaintiff, and that they and the plaintiff desire to have the matter in question decided by this Court, and to have the assessment of the company made under the decision of this Court, and that the company will, unless restrained from so doing, proceed to make such collections, and that there will necessarily be a large number of suits, &c. The bill also states that the plaintiff and the said other policy-holders met together and decided to act in the matter of the payment of the said demands as this Court might direct; that it will be a large saving of expense to have the question of the said liability settled by this suit, inasmuch as questions will arise touching the distribution of expenses between the different branches of the said company, in addition to the other questions thereinbefore mentioned, and that there is no machinery or means in the Division Courts, whereby the amounts payable by the different policy-holders in the said branch can be settled between them, and whereby the said accounts of the expenses of the different branches can be adjusted, and that it is necessary to come to this Court in order to have the accounts of the said assessments properly made and adjudicated. It is also stated in the bill that the company ceased to effect insurances in the water-works branch, and have rescinded or cancelled all policies in this branch as of the 27th day of December, 1880, and that the company are about to wind up the business of this branch. It is then submitted by the bill that the plaintiff and the other policy-holders in the water-

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works branch are liable respectively to pay only their respective portions of the losses and expenses incurred during the currency of their respective policies, and that they are not liable to pay any part of the losses and expenses incurred prior thereto, whether in regard to prior losses or to expenses previously incurred in managing the company and the different branches, and that parts of these prior losses and expenses are included in the said assessment and are being charged against the plaintiff, and that the plaintiff is entitled to the protection of this Court in the matter of the said assessments, as there is no other means of compelling the defendants, the company, to state the amount and date of the different losses, and to give an account of the said expenses, so as properly to apportion the same amongst the different branches.

The bill prays that it may be declared that the plaintiff and those he represents are only liable to pay their proportion of all losses and expenses made by the company in their water-works branch during the currency of their respective policies, and that they are not liable for any part of the losses and expenses had and incurred before the dates of the said policies. For an injunction restraining the company from proceeding with actions at law in respect of the said assessment pending this suit. That an account may be taken of the amount of the assessment due by the plaintiff and the other policy-holders to the defendants the company, on the said promissory notes given by him and them as aforesaid; the plaintiff offering on behalf of himself and those whom he represents to pay what may be found due. Then follows the prayer for all necessary accounts and inquiries, and one for general relief.

By the amendment of the bill *Reginald Kennedy* was made a party defendant to represent the Hamilton branch, it being alleged that he was a policy-holder therein, and *James W. Williams* also a party defendant to represent the general branch, it being alleged that he was a policy-holder therein.

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The demurrer as to parties is to the effect that the amended bill of complaint is filed by the plaintiff on behalf of himself and the other policy-holders associated with him, as in the bill mentioned being only certain of the policy-holders in the water-works branch, and is not filed on behalf of the plaintiff and all the policy-holders in the water-works branch, and therefore the policy-holders in this branch other than the plaintiff and those so associated with him, are not made parties to or properly represented in the suit and would not be bound by the proceedings.

The demurrer for want of equity is the ordinary one stating, in addition that the plaintiff can have all necessary relief by defence to an action at common law on his premium note, &c.

As to the demurrer for want of parties it is plain that if the policy holders in the water-works branch are not represented by the plaintiff they are not represented at all in this suit. The plaintiff does not in so many words say in his bill that he sues on behalf of himself and all the policy-holders in this branch, and if any such policy-holders are unrepresented this fact is fatal.

Judgment.

If, on the other hand, it can be gathered from the statements in the bill that the plaintiff does sue on behalf of himself and all these policy-holders, then I do not see how the plaintiff can represent all the policy-holders in this branch, and this point was not only raised, but, I thought ably argued, by counsel for the defendants, the company.

According to the bill, there is a large number of these policy-holders, and the bill alleges that they are respectively liable to pay only their respective proportions of the losses and expenses incurred during the currency of their respective policies. The plaintiff's liability or interest cannot, according to the bill, be identical with that of each of the policy-holders in this branch who is liable for losses and expenses that happened and were incurred earlier than the beginning

of the currency of the plaintiff's policy, nor can the plaintiff's interest or liability be, according to the bill, identical with the interest or liability of each of the policy-holders in this branch, the currency of whose policy commenced at a time later than the beginning of the currency of the plaintiff's policy, for, according to the bill, each is liable only in respect to the expenses and losses that were incurred and happened during the currency of his own policy.

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Looking at the bill, I think it impossible to say that all the policy-holders in this branch have an identical interest and liability ; and, unless they are precisely of the same class, they cannot be represented by the plaintiff. I think the authorities relied on by the defendants' counsel bear out his argument on this point. See *Jones v. Garcia del Rio (a)*, *Bailey v. Birkenhead and Liverpool R. W. Co. (b)*, and *Carlisle v. The South Eastern R. W. Co. (c)*, in the last of which it is said that the relief which is prayed must be one in which the parties whom the plaintiff professes to represent have, all of them, an interest identical with his own. Here, I think it plain, that many, if not all, of the policy-holders in the water-works branch (other than the plaintiff) would, at some stage of the proceedings, have a case to make adverse to the interests of the plaintiff.

Judgment.

Then if the real meaning of the statement in the bill in this respect is that the plaintiff sues on behalf of himself and all the policy-holders in the water-works branch, the plaintiff not being of ability to represent these, there is a misjoinder of parties. If, on the other hand, the plaintiff has not sufficiently stated that he sues on behalf of himself and all these policy-holders, the bill is defective for want of parties. I incline to think the plaintiff has not sufficiently stated this, and that the latter is the result.

(a) Turner & R. 297 at 301,
 (c) 1 McN. & G. 689.

(b) 12 Beav. 433.

1881. Then as to the demurrer for want of equity, it appears to me that the judgment in the Court of Appeal, in the case of *Duff v. The Canadian Mutual Ins. Co. (a)*, and that of the learned Vice-Chancellor *Blake*, in the case of *Hill v. The Merchants' and Manufacturers' Ins. Co. (b)*, have virtually determined the matter against the plaintiff, and that nothing remains to be considered by me. See also *Bailey v. The Birkenhead, &c., R. W. Co.*, at page 442.

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The demurrers will therefore be allowed, with costs.

STAMMERS V. O'DONOHUE.

*Vendor and purchaser—Vendor's duty as to incumbrances—G. O. 226.
—Practice.*

A vendor agreed to pay off a mortgage existing on the property, and the decree directed a good and sufficient conveyance "according to said agreement." The defendant, the vendor, neglected to pay off the mortgage, and the plaintiff thereupon moved upon petition to amend the decree by ordering the defendant to obtain a discharge of such incumbrance; but the Court [BOYD, C.] directed that the vendor pay off the mortgage within a limited time, or in default, that the purchaser should be at liberty to do so, procure an assignment, and have his remedy against the vendor, whose conveyance he was not bound to accept till this mortgage was paid off; the purchase money in Court to be applied *pro tanto* thereto. *Held*, also, that as the matter had been referred to the Master by the decree which was for specific performance, it should have been disposed of in his office under G. O. 226.

Statement. The decree drawn up in pursuance of the judgment in this case, which is reported ante vol. xxviii., page 207, directed simply a performance of the agreement set forth in the bill of complaint, omitting to say anything about the payment or discharge of the mortgage existing on the property. The Master, on the 31st of

March, 1881, reported that a sum of \$62.60 after deducting the set-off in respect of damages allowed to the plaintiff by reason of the misrepresentation as to the state of the land, was due to the defendant, and which amount the plaintiff had paid into Court to the credit of the defendant and the referee. The defendant, however, had omitted to execute or deliver a conveyance of the land, although repeatedly requested to do so, and had also neglected and refused to obtain a discharge of the mortgage existing on the premises. By the conditions of sale the vendor (*O'Donohoe*) bound himself to prepare, execute, and deliver a conveyance of the property, but had neglected and refused to do so, although demands had been made on him for that purpose.

The plaintiff thereupon presented a petition setting forth these facts, and that by reason of the defendant's refusal and of the limited terms of the decree, the plaintiff had been deprived of his just rights, and that without the decree being amended he was unable to obtain the full measure of relief to which he was entitled.

Mr. *Foster*, in support of the application.

Mr. *Shepherd*, contra.

Machar v. Vandewater (a), *Simmers v. Erb (b)*, *Skinner v. Ainsworth (c)*, *Mason v. Seoney (d)*, were referred to.

BOYD, C.—The defendant admits that he agreed to pay off the mortgage, and the decree directs that he is to convey the lands by a good and sufficient conveyance, “according to the said agreement.” It is not clear that this does refer to the agreement as to dis-

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(a) 26 Gr. 319.

(b) 21 Gr. 298.

(c) 24 Gr. 148.

(d) 2 Chy. Cham. 30.

1881. charging the mortgage which is set up in the 2nd paragraph of the bill ; but the language of the decree imports (what the real bargain was in fact) that the lands are to be conveyed free of incumbrances.

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It is not shewn here in what shape the conveyance has been settled, but I assume that the defendant is the only conveying party therein. It does not appear that proper steps have been taken to put the defendant in default as to its execution. I am inclined to make an order on one branch of the petition, to limit the time within which the vendor is to procure a discharge or release of the mortgage to Mr. *Broughall*. Failing this, the plaintiff should be at liberty to pay it off and procure an assignment or discharge of it, and have a remedy over for the amount necessary to be paid against his vendor.

Judgment

The plaintiff is entitled to have this mortgage paid off or discharged before he need accept a conveyance from the defendant. The money in Court may be applied *pro tanto* to satisfy the incumbrance. Strictly speaking, I think this whole matter might have been disposed of by the Master under General Order 226, with the exception of the order for recoupment, and that his office is the proper forum for the disposition of all such questions. See 1 *Turn. & Venab.* 420 ; *Bennett's* Master's Office, 152, 153 ; *Dart*, 503, 505 ; *Cooper v. Cartwright (a)*, *Seton*, 1328 ; *Gamble v. Gummerson (b)*, *Townsend v. Champernon (c)*, *Magennis v. Fallon (d)*. I give no costs to either party.

(a) Johns. 679.
(c) 1 Y. & J. 449.

(b) 9 Gr. 193
(d) 2 Moll. at 575, 583.

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LANCEY v. JOHNSTON.

Lessor and lessee—Right to bore for oil—Injunction.

The plaintiff, in consideration of \$25.00 paid by defendant, executed in his favour a lease of a small plot of land at a yearly rent of one cent if demanded, with the right on the part of the defendant to remove all buildings at any time during the lease. The lease contained no covenant on the part of the lessee other than those to pay rent and to pay taxes, and it was silent as to any right on the part of the lessee to bore for oil.

Held, that *primâ facie*, the lessee had not the right to bore for oil, and having done so and commenced operations in pumping crude oil, an injunction was granted to restrain the further removal of oil from the premises until the hearing of the cause.

This was a motion for an injunction to restrain the defendant from pumping oil from an oil well upon the lands mentioned in the judgment.

Mr. *Rae* and Mr. *Moncrieff*, for the plaintiff.

Mr. *Street*, for the defendant.

Goodenow v. Farquhar (a), *Drake v. Wigle (b)*, *Coppinger v. Gubbin (c)*, *Elias v. Griffith (d)*, *Dougall v. Foster (e)*, *Clegg v. Rowland (f)*, *Lord Courtown v. Wood (g)*, were referred to.

FERGUSON, V. C.—It appears that the plaintiff on the 8th day of September, 1880, then being the owner in fee of the west-half of sub-lot No. 55 of the sub-division of original sub-lot No. 2 of the sub-division of the east-half of lot No. 9, in the 12th concession of the township of Enniskillen, (so the land is described. It is, I believe, a very small parcel of land in the village

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(a) 19 Gr. 614.

(c) 9 Ir. Eq. 304.

(e) 4 Gr. 319.

(g) 1 Sch. & L. 8.

(b) 24 U. C. C. P. 405.

(d) L. R. 8 Ch. D. 521.

(f) L. R. 2 Eq. 160.

1881. of Petrolia) executed a lease of the same to the defendant for a term of ninety-nine years, to be computed from the said 8th day of September. The lease purports to be drawn in pursuance of the Act respecting short forms of leases, and contains no covenants on the part of the defendant, the lessee, excepting the ones to pay rent and to pay taxes. There was a consideration of \$25 paid by the lessee to the lessor. The rent reserved is the clear yearly rent or sum of one cent of lawful money, if demanded, without any deduction, &c.; the first payment to be made on the 8th day of September, 1881. The lease contains a proviso for re-entry in the usual form, and a covenant for quiet enjoyment, and the lessor covenants that the lessee shall be at liberty at any time during the existence of the lease to remove and take away from time to time any and all buildings and erections that may be placed upon the land. Such is the character of the lease, and it is silent as to any right to sink wells for, in, or take

Judgment. crude oil out of the land. It is alleged that the plaintiff is still the owner of the reversion in the lands, and although this seems to be indirectly denied by the defendant's contention, it is not alleged that any change has taken place in the ownership since the execution of the lease. It is stated and not denied that the defendant sometime in the month of May last commenced to put down an artesian oil well upon the land; that he sunk it to the depth of between four and five hundred feet, and obtained the object of his search by the same turning out to be a producing well, from which he has been for some time, and now is pumping quantities of crude oil. As soon as the plaintiff discovered that the defendant had commenced to put down the well, he gave him notice not to do so, and within a reasonable time afterwards commenced these proceedings against him. There is no complaint on the part of the defendant that the plaintiff stood by and permitted him to expend his money in sinking the

well without objection. Indeed, the contrary is with all candor admitted by defendant's counsel. The contention of the plaintiff is, that the defendant acquired by the lease no right to mine, (so to speak) for oil, and that the defendant's doing so, is an injury to his, the plaintiff's reversion in the land, and is an act of waste, or in the nature of waste, against which the defendant should be enjoined. The contention of the defendant is, that he did by the lease acquire this right, or if he has not the right according to the lease in its present form, there should be a reformation of the document, as his real contract was one for the purchase of the land ; but that being told by the agent of the plaintiff with whom the transaction was made ; that the plaintiff, who was the owner of, and was dealing with other lands in the neighbourhood, was not then giving deeds but only granting leases ; and that the defendant's rights during the period of ninety-nine years would be the same as if he had a deed, (conveyance of the fee,) he the defendant consented to take the lease instead of the conveyance in fee ; and it was stated at the bar that it is the intention of the defendant to set up in answer to this suit these and other facts, and claim a reformation of the lease by way of cross-relief. A number of affidavits have been filed, and the parties have been cross-examined. It is not pretended that the plaintiff has any, or will during the ninety-nine years, have any right to take oil out of this land. The injury of which the plaintiff seems to complain, is stated in his own examination. In one place he says : "The nature of the damage is, that the oil on my property adjoining, will be exhausted in a short time. I am aware that I cannot get the oil under the lease for ninety-nine years, but the land adjoining may be made of less value by draining the oil from it, and people would not pay as much for land for building purposes adjoining an oil well, as they would if there were no oil well there."

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In another place he says: "I do not wish to be understood that wells draw one from the other. Where the oil is got up, it is always floating in water." In another place the plaintiff says: "A virgin lot in the neighbourhood would be much more valuable than one which had been drilled over. The defendant is now pumping oil out of the small lot that I leased to him, and to the extent that he pumps the oil out of it the lot will be injured in value." In another place he says: "I wish to be understood that I do not mean that one well will drain the other wells, but that the more wells that are put down in a given space, the sooner the land will be robbed of its oil." A good deal of evidence has been adduced as to the supposed location of oil in the grounds as to its being in veins or crevices in the rock, and as to the effect of taking oil from one well upon the produce of the wells in the neighbourhood, but this must be for the most part conjectural, or mere matter of opinion; and it was pointedly contended by Mr. *Street* for the defendant, that in a case of this kind the injury complained of must be an injury to the reversion in the identical land, and that merely shewing that other lands of the plaintiff are being injured by the defendant's acts cannot be of avail to the plaintiff here.

Judgment.

The defendant in his evidence says: "I leased the land with the intention of putting two or three wells upon it." He says in another place: "I had no doubt of my right to put down a well if I got a clear lease. I had no lawyer acting for me in the matter before I got the lease. * * Before I took the lease, I had no doubt at all of my right. Mr. *Barker*, (the plaintiff's agent) distinctly informed me that the lease was as good as a deed, for the term of years for which it was drawn, and I believed that to be the case;" and he also says that when he took the land it was not such a piece of land as any one would buy to build on.

Mr. *Barker*, the plaintiff's agent, in his evidence,

says: "I told him (the defendant) that questions had arisen as to reservations in deeds of other lots sold, and that to avoid all trouble, I should only give him a lease: I am sure that that conversation took place with him in these words or to that effect. My impression is, that he said he would prepare a deed, and I told him that a lease would be just as good as a deed for building purposes. I remember the words, 'for building purposes,' distinctly. I think we made the bargain then," and he says his object was to prevent putting down wells on the land.

Another conveyance from the plaintiff to the defendant of an adjoining parcel of land is produced, and it contains a reservation of the crude petroleum oil there may be produced upon the land; and it is contended that even if what the defendant now says about his getting a deed instead of a lease were true, the deed would have been such a deed as this one which bears date the second day of June, 1880, only a few months before the date of the lease. But defendant says he bought this parcel of land for building purposes, and he purchased the land now in question for altogether different purposes, and only took the lease instead of a conveyance under the circumstances before mentioned.

There are other points of difference in the evidence, but I do not think it necessary to refer to them here.

I have examined all the authorities to which I was referred, and many more. The case is in many respects very peculiar. The lease itself is most peculiar. Some appearances point towards there being a good foundation in fact for the defendant's contention as to the conveyance. He will, however, probably find a legal difficulty in his way to a reformation of the lease as well as such other difficulties as usually present themselves in such cases. I think from the evidence before me that there is a substantial right between the parties to be determined, and that my duty is not now upon this application to anticipate the determination of that

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1881. right in any way, but I think that there is so much  
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Johnston. doubt as to the defendant's position, and as to his present right to proceed with the working of the well that he ought not to be allowed to do so until the questions between the parties shall have been tried and determined. This was the view taken by the Master of the Rolls in *Viner v. Vaughan (a)*, and in many other cases of a later date. As it was conceded at the bar that the well will not be materially injured by standing idle for a time, I think it the proper course to be followed here. The order for the injunction will therefore go.

Judgment.

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(a) 2 Beav. 466.

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## DICKSON v. HUNTER.

*Mortgagor and mortgagee—Fixtures.*

The plaintiffs were registered mortgagees of a large tract of land.

*M.* desiring to build a mill in a village where part of the land lay, took a deed of a small portion thereof from one of the owners of the equity of redemption, in order that he (*M.*) should erect a flouring mill thereon. *M.*, without searching the title, and without actual notice of the plaintiffs' mortgage, erected the mill with the intention of establishing a business there. Before its completion, and before the machinery was put in, he discovered the mortgage, but proceeded to put in a boiler, engine, mill stones, and several machines necessary for carrying on milling. On the plaintiffs attempting to sell under their mortgage, the machinery was removed by *M.* An injunction was granted to stay the removal, and an issue was directed to try the title to the mill and machinery. A number of the machines were not attached to the building, being kept in place by their own weight; but they were necessary for the working of the mill, and suited for that purpose only, and the whole structure—building, engine house, boilers, engine, and machinery—was put up with the express purpose of establishing a flouring mill on land that *M.* believed to be his own.

*Held*, that the mill and its contents passed to the mortgagees; and an order was made for restitution of the machinery which had been removed, and the injunction extended to prevent its removal in future, with liberty to *M.* to pay its value to the plaintiffs, which they ought to accept, if offered, and release the machinery.

This was an issue between the plaintiffs and the defendants *Thomas Marshall* and *Margaret Marshall*, directed by an order made in the cause, on the 8th day of June, 1881. The question was, whether the plaintiffs were entitled to the building on the mortgaged premises, and to the engine, boilers, and other machinery, as mortgagees, of the premises, and to hold the same towards the satisfaction of the mortgage security in question in the cause. The order provided that the said *Thomas Marshall* and *Margaret Marshall* should have the right to raise any defences they might have to defeat the claim of the plaintiffs in as full and ample a manner as if such defence had been specially pleaded. The order also provided for an amendment of the petition on which it was granted, by alleging

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that these defendants the *Marshalls* had removed the boiler, engine, and other machinery from the said premises, and secreted the same in various places, and by adding a prayer that they might be ordered to restore the same to the said premises. And it was further ordered that the question as to whether the said *Thomas Marshall* and *Margaret Marshall* should restore the said machinery, and of the continuance of the injunction herein, and of the costs of the said petition and of the trial of the issue, should be determined and adjudicated upon at the same time as the trial of the issue.

Statement.

The plaintiffs claimed as the assignees of a mortgage made in 1876 by one *William Edward Leeson* to *Miss Dickson*, and by her assigned to them, in 1878. This mortgage embraced the land on which the building in question was erected, and the machinery in question was in this building. The mortgage embraced many parcels of land as well as the small parcel on which this building was erected. The defendants, the *Marshalls*, purchased the small parcel for the purpose of erecting a flouring mill upon it. They did erect this mill and put the machinery into it, and these were the buildings and machinery in question. The purchase was made long after the making and due registration of the mortgage, but the defendants, the purchasers, had not in fact notice or knowledge of the existence of the mortgage. It was alleged, and it was plainly established in the evidence, that no purchase-money was paid for the land, it being given in fact without price, in order that the mill might be erected, whereby the value of other lands of the donor or vendor would be increased. It appeared, however, that before the completion of the mill, in all its parts, the *Marshalls* had notice or knowledge of the mortgage, but that the mill was nearly completed before this notice reached them.

The mortgage and the assignment of it to the plaintiffs were put in, and it was admitted that the title to the land was good at the time the mortgage was made :

in short, that the plaintiffs had, for the purposes of the mortgage, a good title to the land.

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Mr. *Moss*. Q.C., for the plaintiffs.

Mr. *W. Cassels*, for the defendants.

The authorities cited were: *Cullwick v. Swindell* (a), *Longbottom v. Berry* (b) *Climie v. Wood* (c), *Boyd v. Shorrock* (d), *Voorhees v. McGinnis* (e), *Frankland v. Moulton* (f), *Pierce v. George* (g), *Browne on Fixtures*, 131, sec. 139, *Bald v. Hagar* (h), *Oates v. Cameron* (i), *Gooderham v. Denholm* (j), *Keefer v. Merrill* (k), *McDonald v. Weeks* (l), *Schreiber v. Malcolm* (m), *Patterson v. Johnston* (n), *Crawford v. Findlay* (o), *Holland v. Hodgson* (p), *Mather v. Fraser* (q), *Hutchinson v. Kay* (r).

FERGUSON, J—[After stating the facts above set forth.] There was not any question at the trial of the issue as to the building, for that is still upon the land, and seems to have been abandoned by the defendants, but evidence was given shewing the manner of its construction, for the purpose, I apprehend, of the better understanding the questions raised as to the real position and the attachment or not thereto or to the realty of the items of machinery about which the contentions were. The items of machinery in contention, and which it was alleged the defendants had removed from the place, were a boiler, a steam-engine, three runs of millstones, a merchant bolt and another one, a cooler,

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(a) L. R. 3 Eq. 249.

(c) L. R. 3 Ex. 257, In App. 4 Ex. 328.

(e) 48 N. Y. 278.

(g) 108 Mass. 78.

(i) 7 U. C. R. 228.

(k) 6 App. R. 126.

(m) 8 Grant 433.

(o) 18 Grant 51.

(q) 2 Kay & J. 536 at 559.

(b) L. R. 5 Q. B. 123.

(d) L. R. 5 Eq. 72.

(f) 5 Wis. 1.

(h) 9 U. C. C. P. 382.

(j) 18 U. C. R. 203.

(l) 8 Grant 297.

(n) 10 Grant 583.

(p) L. R. 7 C. P. at 334.

(r) 23 Beav. 413.

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said to be in the top story of the mill, a smut machine, in the basement story, and a bran duster, also in the top story; and the question was substantially whether or not these articles, or any of them, were fixtures and part of the realty. If they were part of the realty it was apparently conceded that the defendants had not the right to remove them as they had done. If they were not part of the realty it was, on the other hand, apparently conceded that the defendants had such right..

Only two witnesses were called, Mr. *McCaul*, (a builder, who had seen the premises whilst the mill was working), on behalf of the plaintiffs; and the defendant *Marshall* himself, on behalf of the defendants.

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There was not any substantial difference in the evidence of these witnesses as to the manner of construction of the building. The mill was a frame building placed upon a foundation of stone (masonry) six or seven feet high. The land on which this was placed was an incline, and on one side this stone foundation was in the ground to a greater depth than on the other, but the part enclosed by the stone walls formed the basement story of the mill. It was said that there was not any fastening of the timbers of the frame of the building to this stone wall foundation.

The engine house in which the boiler, &c. were, was a one-story stone building, erected alongside of the mill for the purpose of an engine house for the mill, and was built against, and in this way attached to and formed part of the mill building.

The witness *McCaul* could give only general evidence regarding the machinery. At the close of the plaintiffs' case, counsel for the defendants thought that no case was made, and moved accordingly, but I thought a *prima facie* case had been made as to some of the property at least. This witness said that the mill was used for a flour mill, or for a grist mill. He saw it while it was running. He said the boiler was what



was termed a "set boiler," or "built-in" boiler, and that it was encased with brick: that the engine appeared to be put in in a permanent and substantial way, and in the usual manner for such a building; that there was shafting connecting them with the mill; that there were three runs of stones placed in the usual way; that the mill appeared to be in good running order, and that the manager of it told him so; that the power was transmitted from the engine to the mill in the usual way, and the whole seemed to be constructed for the one purpose, that which they were being used for—this mill. This witness, however, said that he was not a machinist, but only a builder, and was not able to give particular evidence as to the various parts of the mill and machinery. It was admitted that the machinery in question had been removed by the defendants the *Marshalls*, or by their order.

The other witness, *Marshall*, was not either a miller or machinist, but a farmer, yet being the owner of this mill he was able to give, and did give, a somewhat minute and particular description of the manner in which some of the machinery was placed in the mill.

According to his evidence the boiler was suspended by four iron rods. I think he used the expression "strung up." There were built in the engine house four pillars of brick, one upon each side of each end of the boiler, standing as it were at each of the four angles of a parallelogram. Upon each two of these pillars and across each end of the boiler was placed a beam of timber. These pillars seem to have been built from and upon the bottom of the engine house. On each side of the boiler were two hooks or projections of some kind, one near each end of it. Upon each of these hooks an iron rod was hooked or fastened in some way, and was passed up through a hole through the beam above, which, as before stated, was laid across on each two of the brick pillars. On each of these rods above, and I suppose partly in the beam through which it

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1881. passed, there was a screw on which was a nut, so that by turning these nuts either end of the boiler could be raised or lowered. This contrivance the witness said was for the purpose of levelling the boiler, to use his own words, "It is for letting the boiler up and down when it is not level;" and this the witness repeated after a very suggestive question as to its being "movable." The furnace was constructed by building a wall of stone on each side of the boiler, and continuing these up and partially around the boiler. The witness *McCaul* thought these walls were of brick, but this witness says they were of stone, but afterwards speaks of them as being partly of brick, and he says that the boiler did not rest upon the floor at all, but was thus suspended by these four hooks or spurs. These walls on each side of the boiler were let into the ground about one foot. In giving his evidence this witness said that these walls of stone built thus at the side of, and partially around the boiler, were not permitted to touch it in any place, but were kept about an inch away from it. On this boiler was placed a smoke stack sixty feet high which passed through the roof of the engine house. It rested upon one end of the boiler in much the same way as a stove pipe rests upon the stove, there being a projection to receive it. It was some 900 pounds in weight, and was sustained in position by iron wires, one end of each of which was made fast to it near the top, and the other end fastened in some way to a post planted in the ground outside of the building. The boiler was of the weight of about three tons.

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The manner in which the engine was put in was this. A solid stone foundation was built some four or five feet high or deep, the same being let into the ground in the bottom of the room about one foot. On this were placed beams of timber which were not, according to the witness, fastened in any way to the foundation. Iron bolts were passed upwards through

these timbers, each one having a head on the under side of the timber, and a screw on the upper end. These were passed through the timbers before they were laid upon the foundation. The engine was then laid upon these timbers the bolts passing up through corresponding holes in the lip of the engine bed, and a nut screwed down tight upon this lip. The stroke of the engine was a horizontal stroke. The engine was of sufficient power to drive this mill, said to be a 30-horse power, weighing 2,500 lbs., with a fly-wheel of 1,800 lbs. Yet, according to the witness, the timbers on which rested the engine were not in any way fastened down to the solid stone foundation. The witness did not profess to say that he had built or helped to build this foundation or lay the timbers upon it, but that he was present when it was done. There was, however, no other evidence upon this point.

The power was communicated to the mill by means of a horizontal shaft passing through the basement story on which were bevelled wheels; joining with each of three such wheels, one upon each of three perpendicular shafts, the foot of each of which was in a socket in the floor of this story of the mill, and each one of these extended upwards and imparted the power that worked one run of stones. These stones were placed in the usual manner. From the main horizontal shaft in the basement story there came another perpendicular shaft (the communication being by means of bevel wheels as before) which imparted the power that drove the other machinery in the mill, the bolts, the cooler, and the bran-duster.

As I understood the witness and the evidence, the cooler was driven by a perpendicular shaft in much the same manner as that by which the stones were driven.

The witness said that the bran duster, as well as the stones, was driven by the lower horizontal shaft. The bran duster stood upon the floor of the third story, and

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1881. the smut-machine upon the floor of the basement: neither was fastened. It was not easy to understand from the witness precisely how the machinery was situated, and how the power was applied in each case.

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There was what was called a hurst-frame, on which the lower one of each run of the stones rested. This was a very solid frame of timber twenty-four feet long, twelve feet wide, and about nine feet high or deep. This was built from the foundation (bottom) of the mill, and passed up through a space left for it in the floor, and seemed to be for the purpose of having a more solid place for the stones to rest upon than could be obtained by resting them upon cross-beams of the building. The witness said that the frame was not in any way made fast to the timbers of the building. The three runs of stones were in a row upon this frame. There were two bolts. For these there was a frame built in the ordinary way and set on the floor, and in this the bolts were placed. Each bolt was about four feet wide, eight feet high, and twenty-one feet long. This frame stood on the floor by its own weight. There was, according to the evidence, no fastening. The smut-machine and bran-duster also stood on the floor by their own weight, according to the evidence, without fastening. The cooler, according to the evidence, rested in the same way as the upper millstone.

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It is plainly stated by *Marshall* that all this machinery was put into the mill in the usual way: that it was put in for the purpose of the mill, and for no other purpose; that it was permanently placed there, and that there was not any intention of taking it, or any part of it, out of the mill.

The case of *Cullwick v. Swindell* (a) following *Ex parte Cotton* (b), shews that trade fixtures affixed to mortgaged freehold premises *after the mortgage*, by the mortgagor and his partner occupying the premises for the purposes

(a) L. R. 3 Eq. 249.

(b) 2 M. D. & D. 725.

of their trade pass to the mortgagee. *Frankland v. Moulton* (a) decides that if a tenant of the mortgagor place fixtures the consequence is the same as if the mortgagor had done so. The mortgagor cannot confer upon his tenant a privilege that he himself has not at the time of the making of the lease. *Huberschmann v. McHenry* (b), decided that a building erected upon land by one who enters claiming adversely to the true owner, and used by him as part of his adverse enjoyment, is a fixture which the occupier has no right to remove as against the owner of the land, although the same is of wood resting only upon the surface of and not let into the soil.

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A passage in *Ewell* on Fixtures, at p. 21, referred to with approval by the Court of Appeal, in *Keefer v. Merrill* (c), is as follows: "Undoubtedly physical annexation exists in the great majority of cases under this branch of the law, and is an important, and often, as bearing upon the question of intention, a controlling element in determining the question whether an article is or is not a fixture, but the weight of modern authority and of reason, keeping in mind the exceptions as to constructive annexation admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests: 1st. Real or constructive annexation of the article in question to the realty. 2nd. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. 3rd. The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, *the relation and situation of the party making the annexation*, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for

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(a) 5 Wis. 1.

(b) 29 Wis. 653.

(c) 6 App. 126.

1881. which the annexation is made. Of these three tests the clear tendency of modern authority seems to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention."

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The learned Mr. Justice *Burton* then says: "The exceptions referred to as constructive annexations being those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character," such as the vases referred to in *D'Eyncourt v. Gregory (a)*, mill stones, the ordinary snake fence, and the like, and the learned Judge continued: "To these may be added, as coming within the same principle, in the case of a deed or mortgage of a manufactory, that portion of the machinery of such manufactory, whether the same be fast or loose, which is essential to the operation of the fixed machinery and intended to be used as part of it, and without which it would be useless, and the building no manufactory at all."

The learned Judge was there considering a case where the machinery was placed on the land subsequent to the execution of the mortgage, and in that one respect at all events like the present case. He reviewed many of the cases to which I have been referred by counsel, and amongst the rest *McDonald v. Weeks (b)*, *Patterson v. Johnston (c)*, and *Gooderham v. Denholm (d)*, and spoke approvingly of the language of the present Chief Justice in *McDonald v. Weeks*. The learned Judge then said: "It does seem in many cases that could be put but a flimsy distinction that articles are fixtures when nailed or screwed, or bolted into a building, and are not so when their own weight gives them steadiness in their place without such aid."

The learned Judge, after referring to many other cases, said: "It appears to me that there is no difference

(a) L. R. 3 Eq. 382.

(b) 8 Gr. 297.

(c) 10 Gr. 583.

(d) 18 U. C. R. 203.

of opinion amongst the Judges to whose decisions I have referred, upon the main points, viz., that in all cases the question of intention is mainly to be looked at, the difference arises in considering what is sufficient evidence of that intention. I think it impossible to hold that the circumstance of the machinery being brought upon the land by the owner of the freehold raises the presumption that he intended them to become part of the realty, although the slightest annexation might raise a presumption that he intended to improve the land and make them a permanent accession to the freehold."

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The learned Judge then pointed out the position of the plaintiff in that case by saying: "The difficulty that the plaintiff labours under is, that there is no evidence *aliunde* to explain the intention, and there is no annexation in fact from which, looking at the relation of the parties, an inference of intention might be gathered. His is, therefore, the case of a mortgagee of freehold claiming that machinery brought upon the mortgaged premises passed to him, although the mortgagor may have studiously avoided annexing them to the freehold to prevent his doing so."

Judgment.

In the same case the learned Mr. Justice *Patterson*, at p. 137, makes a copious extract from the case *Holland v. Hodgson (a)*, in which it is said that, "there is no doubt that the general maxim of the law is, that whatever is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose." It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention; *the degree of annexation, and the object of the annexation*. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel." Referring to *Wiltshear v. Cottrell (b)*,

(a) L. R. 7 C. P. 328.

(b) 1 E. &amp; B. 674.

1881. and the cases there cited : " But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land." The learned Judge then refers to the rule formulated in *Holland v. Hodgson (a)*: " that articles not otherwise attached to the land than by their own weight, are not to be considered as part of the land unless the circumstances are such as to shew that they were intended to be part of the land, the *onus* of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land unless the circumstances are such as to shew that it was intended all along to continue a chattel, the *onus* lying on those who contend that it is a chattel. This, however," it is there remarked, " only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the *onus*." The learned Judge then makes the remark that in the case *Holland v. Hodgson*, prominence is given to the element of intention, and notices that its importance is more strongly insisted upon when it explains the object of the annexation of the article in question, and when it may thus serve to preserve to it the character of a chattel, than when it operates to make an article not annexed a fixture ; but even in the latter case, it is explained, if the intention is apparent to make the articles part of the land, they do become part of the land. Towards the conclusion of his judgment the learned Judge expressed the opinion that the Court should act upon the law as given effect to in *Chidley's Case (b)*, at the same time repeating his belief that the current of authority is against treating as fixtures anything which is not in fact annexed to the realty except in cases such as *D'Eyncourt v. Gregory (c)*, where the article forms,

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Hunter.

Judgment.

(a) L. R. 7 C. P. 328.

(b) 32 L. T. N. S. 486.

(c) L. R. 3 Eq. 382.



as it were, part of the fabric as an integral portion of the architectural design, though not actually fastened, or as in the familiar case of a mill stone which is an essential part of the mill; and the concluding remark of the learned Judge is, that he thinks a policy discernible in the cases on the subject, and especially the later ones, to the effect that an article should not be held to have ceased to be a chattel unless attached really and not constructively to the freehold. In the same case the learned Vice-Chancellor *Blake* rested his judgment upon the facts that the articles in question were not affixed, and that there was no evidence of an intention to make them a permanent addition to the freehold. He says: "The intention of the owner of the premises must be shewn in some manner in order that what previously were chattels may become fixtures, and thus part of the realty."

1881.

Dickson  
v.  
Hunter.

In the case *Strickland v. Parker (a)*, it is stated that it is the permanent and habitual annexation, and not the manner of fastening that is important in determining the question, and I cannot avoid being of the opinion that many of the cases shew the same thing, though the same words are not employed. The decision of the case *Keefer v. Merrill (b)*, against the mortgagee, rests undoubtedly on the facts of there not being any annexation of the property to the freehold, and the absence of evidence *aliunde* to explain the intention, and there being no fact from which the inference of intention might be gathered; in other words the articles not being attached otherwise than by their own weight, the *onus* was upon the mortgagees to shew that they were intended to be part of the freehold, and they did not shew this. Had the articles been annexed to the land, or had there been evidence sufficient to shew that the intention was that the articles should become and be part of the land, there can be no doubt that the

Judgment.

(a) 54 Maine, 263.

(b) 6 App. 126.

1881. judgment of the Court would have been one affirming the judgment of the learned Chief Justice before whom the cause was heard.

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v.  
Hunter.

I have examined with care all the cases referred to by the learned counsel, and naturally in a case of this character a great many more, and my conclusions are as follow :

I think there can be no doubt that the building was and is a fixture and part of the land. This, however, for the reasons before stated, is not of much, if any, importance in the case. As to the boiler, I am of the opinion that this was annexed to and became part of the freehold. I think the manner in which it was encased, if I may use the expression, with either stone or brick walls which were let into the ground about a foot for the purpose of getting a solid foundation for them, and the manner in which the smoke-stack, resting on top of the boiler, as was described, was maintained in its place, if there were nothing more, shew a sufficient annexation to the land. I do not think that the fact of the boiler being suspended, as it undoubtedly was, as is before described, and what is said in the evidence about the large door in the engine house, sufficiently shew, or shew at all, an intention to preserve the character of the property as movable or a chattel. On the contrary, I do think the facts proved—entirely apart from the verbal testimony as to what was in fact the intention—sufficient from which to infer that the intention was to make the boiler part of the freehold; and even if I were not of the opinion that it was annexed, I would still hold that it was made a part of the freehold.

Judgment.

As to the engine, I cannot think that this is in the same position as a machine brought into a factory and placed on the floor and there worked by the power with which other machines in the same factory were worked. Here there was a solid foundation of stone constructed for the sole purpose of this engine. It

served no other, and was not intended to serve any other purpose. It was let into the ground for the purpose of getting a solid foundation. Timbers were laid upon this to receive the engine, and to these the engine was made fast. I think the proper view of the facts is, that the stone foundation and the timbers constituted one thing, the foundation, that the timbers were employed for the convenience of fastening the engine, it being inconvenient, or perhaps impossible to bolt or fasten the engine to the stones. The engine, according to the evidence, was certainly placed where it was in a permanent manner. The timbers were certainly not a part of the engine, but a part of the foundation made to receive it, and if I was obliged to risk a decision upon the point, I think I should say that the engine was annexed to the freehold; but be that as it may, a part of what I have said regarding the boiler is applicable here; the facts proved, and they are apparently undisputed facts now, apart from the oral evidence of intention before alluded to, afford an inference that to me is irresistible, that the intention was to make the engine a part of the freehold.

1881.

Dickson  
v.  
Hunter.

Judgment.

As to the mill-stones, I think that mill-stones are so universally held to become part of the realty when placed in a mill, as being necessary to its working, and, as it is said, to pass to the heir, that I need only say here that in my opinion these mill-stones became a part of the freehold.

Then, as to the other four articles mentioned in the evidence, the bolts, the cooler, the smut-machine, and the bran-duster. These, according to the evidence, as I understand it, were not annexed otherwise than by their own weight, each standing upon the floor, but in different places in the mill, and they appear to me to come within the rule in *Holland v. Hodgson (a)*, and that the onus of shewing that they were intended to be part of the land rested upon the plaintiffs; and the question

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(a) L. R. 7 C. P. 328.

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Hunter.

is, I think, whether or not the plaintiffs succeeded in shewing this. The circumstances material, briefly stated, are these. The defendant *Marshall* purchased this piece of land, and thought he was the owner of it. He did so for the purpose of building upon it a mill, this kind of mill. He let the contract of the building of this mill upon this land to Messrs. *Goldie & McCullough* who were mill builders. He did not understand the building of a mill at all, nor was he a miller by trade. His brother, however, was. *Goldie & McCullough* built the mill pursuant to this contract. They built a mill. It was one thing, and for one purpose. The effect of the evidence is, that all these articles were parts, and no doubt they were necessary parts of that one thing—the mill. There is nothing to shew that any one of these articles was made or brought there separately or for any purpose other than as part of and a component part of this mill. There is nothing whatever to shew that any one of these articles was placed

Judgment.

in this mill for the purpose of the better enjoyment of its use as a chattel. They were permanently placed in the mill, although not fastened; and, in my opinion, all the facts and circumstances combine to lead to the inference—which I think irresistible—that the intention was, that they should be part of the land; and these remarks are to apply as well, so far as there may be any necessity, to the boiler, the engine, and the mill-stones.

Then the oral evidence of the defendant *Marshall* as to the actual intention shews the same thing. I think the evidence to answer the onus that was upon the plaintiffs quite sufficient, and that the true conclusion is, that this machinery, and every part of it, became and was part of the land, and that the plaintiffs were and are entitled to it for the purposes of their mortgage.

It is admitted that this machinery was taken away by, or for, the defendants, the *Marshalls*. I think it was wrongly taken away. The defendant *Marshall* in his evidence says he can get the machinery if neces-

sary, and the order for its restoration will go. If the value of the machinery were offered instead, I apprehend the plaintiffs would, and I think they should, receive it, and forego taking out the order. The present injunction will be continued, as asked.

1881.  
Dickson  
v.  
Hunter.

And I think the plaintiffs are entitled to all the costs mentioned in the order pursuant to which this issue is tried, and to the costs of trying it, and order accordingly.

I may, I think, without impropriety, add, that I should have been pleased had I been able, upon the law, as I understand it, and the facts, to arrive at the opposite conclusion.

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1881.

## HAYES V. HAYES.

*Appeal from Master—Trustee and cestui que trust—Just allowances—  
Special Findings, power and duty of Master as to.*

The defendant was the assignee of a policy of assurance on his brother's life, in trust to pay himself certain moneys and expend the residue in the support and maintenance of the assured's family, and having made further advances on the advice of his brother, who was a practising barrister, he took a second assignment of the policy absolute in form. On the death of the assured the defendant, asserting a right to obtain payment of the policy, went to the head office of the company in the United States, in order to hasten the payment, pending a dispute with the plaintiffs—the family of the assured—as to his rights. In taking the accounts between the parties, the Master found that the defendant acted *bonâ fide* in so doing and allowed his expenses, although the company, at the instance of the plaintiffs, refused to pay him, and sent the proceeds of the policy to their solicitors in Toronto, to be paid over to the party entitled.

*Held*, on appeal from the Master [affirming his ruling] that as the defendant was under either assignment entitled to possession of the fund—either as trustee or individually—and as the Master under all the circumstances, thought fit to allow such expenses, and it did not appear clear to the Court that such allowance was wrong, the item should be allowed.

*Held*, also, that the Master had properly allowed to the defendant in his accounts a fee of \$10 paid by him to counsel for advice as to his action in respect of the two assignments.

The Master, at the request of the defendant, reported specially in his favour as to many matters not particularly referred to him, but which formed the subject of charges of fraud made in the bill of complaint :

*Held*, that the Master had power to report specially any matters he deemed proper for the information of the Court, and that it was his duty to so report any matter bearing on the question of costs.

This was an appeal from the report of The Master, by the plaintiffs in the cause.

Mr. *Donovan*, for the appeal.

Mr. *E. D. Armour*, contra.

The circumstances giving rise to the suit and the grounds on which the appeal were based, are clearly stated in the judgment.

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Hayes.

FERGUSON, J.—It appears that the respondent had, during the lifetime of the late *Michael Hayes*, made very considerable advances to him, to relieve him, from time to time, from certain necessities and difficulties that need not be particularly referred to. That *Michael* had a policy of insurance upon his life with the Connecticut Mutual Life Insurance Company for the sum \$6,000. That on the 13th day of June, 1873, *Michael*, by deed, assigned this policy to the respondent in trust, first, to repay himself (the respondent) the sum of \$1,112, (by this deed acknowledged to be then owing by *Michael* to him) and the interest thereon. Second to use the remaining proceeds of the policy in support and maintenance of the widow and children of *Michael* (the appellants), the expenditure of such proceeds for such support and maintenance to be according to the directions and under the control of the respondent, or of such person or persons as he might appoint to succeed him in the trusts or to act for him in relation thereto. That in the year 1876, *Michael* having in the meantime become further indebted to the respondent, another assignment of the said policy was made by him to the respondent, which was absolute in form, both the brothers then believing that *Michael* had power to do this notwithstanding the former assignment; *Michael* being a lawyer, and the respondent being a banker. The policy was afterwards assigned by the respondent to one *McCaughey* as a collateral security for the payment of the money that (it is said) was obtained for the benefit of *Michael*, and was so in the hands of *McCaughey* at the time of the decease of *Michael*, which occurred in the month of June, 1879.

Sept. 13th.

Judgment.

It appears that the respondent then, or shortly there-

1881. after, paid and satisfied, or secured the debt to *McCaughey*, and obtained from him a release of the policy, and having made the necessary proofs, claimed from the insurance company the amount owing upon it. It appears, however, that in making the claim upon the company he produced both the assignments to him from *Michael*, but he claimed the money as his own, and the company were about to pay it to him upon getting his receipt, both as assignee of the policy and as trustee under the first assignment, when they were notified by the solicitor for the appellants not to pay the money to the respondent, and they decided to send the money to their own solicitors in Toronto, to be by them paid over to the party or parties who might shew a legal right to receive it. Whilst the money was so in the hands of their solicitors, the contending parties met and an agreement was entered into between the respondent and the solicitor for the appellants, according to which the sum of \$2,500 was to be deposited for the benefit of the appellants, and the balance was to be paid to the respondent. This deposit was made, and, as I understand, the balance paid to the respondent and certain small payments out of the \$2,500 made to the widow. Owing, however, to a dispute as to the right of the respondent to receive a certain portion of the \$2,500, and the refusal of the widow and her son to sign or indorse certain cheques respecting this portion, the respondent notified the trustee, in whose hands the \$2,500 was deposited, not to pay any more of the money to the appellants; whereupon the bill of complaint in this cause was filed for, amongst a great variety of things, specific performance of this agreement or settlement, as it is called. Answers were duly filed, and the cause brought on for a hearing, when it was by the Court declared that the alleged agreement of which specific performance was sought, was not binding upon the parties, but owing to and upon certain submissions in the answer of the respondent, it

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Hayes.

Judgment.



was ordered by the Court that it should be referred to the Master in ordinary to take an account of the proceeds of the said policy of insurance, and of the respondent's dealings therewith, and also to inquire and state who was entitled to the said proceeds. The other defendant, the depositary of the \$2,500, had, in the meantime paid the same, or the balance thereof remaining in his hands, into Court. There are many other things in the pleadings which it is deemed unnecessary to refer to except as may hereafter appear.

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Hayes  
v.  
Hayes.

The Master by his report found that the proceeds of the policy were \$5,778, and that the respondent had received this sum from the insurance company on the 10th day of October, 1879: that the respondent was entitled to the sum of \$1,530 95c., being, as I understand it, the \$1,112 and interest on the same; and also the sum of \$1,661 99c., being the aggregate of the amounts paid by him in payment of premiums upon the policy to keep the same alive, and interest thereon, and as to these two sums there is not now any dispute. The Master also found that the respondent was entitled to \$97 28c. (including interest) expended by him for the benefit of the appellants, and the sum of \$62 31c. (including interest) paid by him for travelling expenses in going to Hartford in and about obtaining payment of the insurance money.

Judgment.

The Master found that of the \$2,500 there was in Court the sum of \$2,345 92c.: that the respondent was entitled to \$77 43c. of this sum for his own use, and to the balance thereof, after deducting certain costs therefrom, as trustee under the trusts contained in the assignment of the said policy, bearing date the 13th June, 1873.

And at the request of the respondent the Master certified specially as follows:

1. That the appellant *Mary Ann Hayes* had released her dower in the lands referred to in the 5th paragraph of the bill of complaint to *McCaughey* when the same

1881. were mortgaged to him by the respondent, that the claims against the said lands exceeded the value thereof, so that her dower or right of dower in the equity of redemption was of no value, but that one *Joseph Kidd*, who had advanced money to *Michael Hayes*, after the death of the said *Michael* agreed to take the said lands, assuming the mortgage thereon to the Trust and Loan Co., and to pay a sum of \$500, part of which was to be applied in payment of over-due interest upon the same mortgage, and the balance to be paid to the appellant *Mary Ann Hayes*, which is the small sum of money referred to in the fifth paragraph of the bill. The said sum was paid by the said *Kidd* to the respondent at the request of the appellant *Mary Ann Hayes*: she saying that he was the person best entitled to it, as he was paying out a great deal of money for them.

Judgment.

2. That after the assignment of the said policy dated the 13th of June, 1873, had been executed, and in or about the month of October, 1876, the said *Michael*, who was a practising barrister and attorney, represented to the respondent, who was a bank manager, that the assignment of the said policy which had been executed was a revocable one, and that he could legally execute another and absolute assignment thereof, and thereupon the second assignment of the said policy, dated the 20th day of October, 1876, was executed; that the respondent acted in good faith in taking the second assignment, and relying on the representations then made, and the advice then given by the said *Michael*, believed that he thereby acquired an absolute right to the said policy to his own use.

3. That after the death of the said *Michael*, and at the time when the respondent believed that *McCaughey*, to whom the said policy had been assigned, was entitled to the proceeds thereof, he agreed to pay for the benefit of the appellants the sum of \$40 per month, looking to the other brothers of the said *Michael* to recoup to him, if they could, part of the said sum, and that the respondent did, for a time pay the same.

4. That the charge, contained in the sixteenth paragraph of the bill, that the respondent is actuated by motives of resentment towards the appellants, and the expression or belief contained in the said paragraph, that the respondent will, in his vindictiveness, seek any means and opportunity to harass and annoy the appellants in the administration of the said trust, had been totally disproved and shewn to be unfounded by the evidence and proceedings before him.

5. That the respondent did not conceal the trust from the appellants with the intent to defraud them of any share of the insurance; that the statements made by the respondent as to the appellants having no interest in the fund were made at a time when he believed they had none, and ever since he obtained legal advice that the first assignment of the policy was valid and binding, he has always admitted their interest therein. And—

6. That before the hearing of the cause the respondent's solicitors wrote to the appellants' solicitor as follows: "We are instructed by our client to make an offer of compromise of this suit without prejudice to his right in the suit. In order to prevent the exposure of family affairs to the public, he has requested us to desire you to communicate to Mrs. *Hayes*, and such of your other clients as may be of sufficient age, his offer to continue his payment of \$40 per month for three years from this date, as he was making them before litigation commenced: in consideration of this, that the money in Court should be paid out to him forthwith, and that each party should pay his own costs. We are assured it will prevent a great deal of unpleasantness if the parties can come to this arrangement. Be kind enough to advise us at once whether you will communicate the offer to your clients, or if you do so please advise us of the result, as we wish to telegraph the reply." To which letter the plaintiffs' solicitor replied the same day: "Your offer is most respectfully declined."

1881.

Hayes  
v.  
Hayes.

Judgment.

1881.

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v.  
Hayes

The first ground of appeal is, as to the allowance to the respondent of the \$97 28c., the appellants contending that only about \$40 of this sum was paid by the respondent to be expended for the maintenance of the appellants, and that the surplus over this \$40 was voluntarily paid by the respondent in discharge of certain debts of his deceased brother, and which he had no right to charge against the trust fund. This is the sum of Schedule "E" of the accounts. The respondent verified the accounts in the usual way. In his examination in chief he swore positively to the amount, saying he gave it to the family for maintenance after his brother's death, but that he did not know what they did with it. In his cross-examination there appears some confusion as to the dates of the payments of some of the small sums, and there may be a possibility that some of the money, though paid for maintenance, went to pay for some things that were actually consumed by the family immediately before the death of *Michael*, but there is no question but that the money was paid. The Master has found that it was properly paid for maintenance, and has allowed it. I am, after having carefully examined the evidence, far indeed from saying that the Master was wrong, and as to this ground I think the appeal should be dismissed, with costs.

Judgment.

These cond ground of appeal is, as to the allowance by the Master of the \$62 31c. for travelling expenses to Hartford, the appellants' contention being, that this sum was expended for the sole purpose of obtaining possession of the trust fund with the view to defeat the claim of the appellants thereto, and that the journey was useless, because the company had been notified not to pay the money to the respondent. There can be, on the evidence, no doubt but that this money was expended by the respondent. The Master has found that it was honestly expended, and with a view to hasten the payment of the money. He has found against the appellants' contention as to the pur-

pose and intent of the respondent in going to Hartford when this money was expended, and a moment's consideration shews that it was not necessary for the respondent to make any exertion as against the appellants to get possession of the money, for under either of the assignments of the policy the respondent was entitled to the possession of the fund, and to be paid by the company. According to the terms of the policy the money was payable at the city of Hartford to the executors, administrators, or assigns of the deceased in ninety days after satisfactory proof of the death. It is probable that the business could have been done without going to Hartford, and by incurring some legal expenses instead. It is possible, too, that the respondent's presence in Hartford to make explanations to the company had the effect of hastening the payment of the money. The evidence shews that it was sent to the solicitors of the company here to be paid over by them to the party entitled to it. This course seems to me to be unusual, and I think it is plain that the solicitors here could more readily ascertain who really was the person entitled to receive the money, than could the officers of the company at Hartford. The Master having allowed this sum, under all the circumstances, as a just allowance to the respondent, I cannot at all see my way to the conclusion that he was wrong in so doing, and I think that as to this ground the appeal should also be dismissed, with costs.

Then as to the various matters specially certified by the Master, at the request of the respondent; the appeal is against these on two general grounds, namely, that they are not supported by the evidence, in other words, that the findings of the Master are incorrect; and (2) because these were not matters referred to the Master by the decree, nor had they any close relationship to the matters so referred, and the Master should therefore not have certified or reported in respect to them at all; and it was also argued that the Master

1881.

Hayes  
v.  
Hayes.

Judgment.

1881. should not have so certified specially, because a tendency of his so doing was to prejudice the appellants at the hearing on further directions as to the question of costs. After a most careful perusal of the evidence and a consideration of all the arguments of the learned counsel for the appellants, I arrive at the same conclusion as to the facts as did the Master. I think his findings contained in the matters specially certified are correct in every particular, and my judgment upon this part of the appeal is in favour of the respondent. Then as to whether or not the Master should have been silent instead of complying with the respondent's request, and certifying specially as he did. I have not been referred to any authority shewing or tending to shew that the Master adopted an improper course in so certifying, or shewing that the Master is limited in regard to the subjects in respect of which he may specially certify to the Court, and I find the learned Chief Justice of Ontario (then the Chancellor) in his judgment in the case of *Rosebatch v. Parry (a)* reported to have said: "While the matter is still before the Master he may, at the request of any party, report specially as to any matters which he may deem proper for the information of the Court." No doubt the Master in the case now under consideration, deemed the matters specially certified proper for the information of the Court, or he would not have so certified. It may be that the learned Chief Justice was, in the case above mentioned, only contrasting a certificate made by the Master after he had made his report in the case, with one granted at the request of a party before the making of the report, and whilst all the parties were before him, and that the words used by him were not intended to have that full meaning when applied to the general and larger question; but when I consider the care with which that very

learned and experienced Judge employs language in his judgments, I am of the opinion that the intention was, that these words should have their full signification, and not having been referred to any authority shewing a limitation of the Master's power in this respect, I arrive at the conclusion that the contention of the appellants cannot be sustained; and, besides, it is not to be overlooked that most of the matters so specially certified to are mentioned in the appellants bill of complaint.

Then as to the argument that the Master should not have so specially certified on account of the effect of his so doing on the question of costs at the hearing on further directions. I find that in the case of *Simpson v. Horne*, (a) the learned Chief Justice refers to the rule as being, "that the Master may, and in a proper case ought, to report any matter bearing upon the question of costs." The case referred to by the learned counsel for the appellants on this point does not, I think, support his contention.

A further ground of complaint of the appellants is, that the Master allowed to the respondent the sum of ten dollars, paid for legal advice, adding, that the advice was to assist him in defrauding the appellants. I have had the misfortune to have overlooked this item in perusing the accounts, but, assuming that it has been allowed, the law seems to be that a trustee may give fees to a counsel, and shall have allowances therefor; *Lewin* on Trusts, 7th ed. p. 546, and the early and late cases there referred to; and it seems to me that owing to the two assignments of the policy and some other matters, this was not an improper case to take advice in, and as to the charge that the purpose was fraudulent, the finding of the Master must have been against the appellants, or the allowance would not have been made. As to this

1881.

Hayes  
v.  
Hayes.

Judgment.

1881. ground the appeal should, I think, be dismissed, with costs.

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v.  
Hayes.

Then there is the complaint of the improper rejection of evidence contained in each of two grounds of appeal. The appellants' contention as to this must fail, I think. There is nothing to shew that any tender of evidence was made. The appellants do not now shew what the rejected evidence was so that it may be seen whether it should have been received or not. I am of the opinion that the appellants have not placed themselves in a position to sustain their contention on this ground. The case of *McDonald v. Wright*, (a) may be looked at on this point.

The appeal (as to all the grounds thereof) is dismissed, with costs.



1881.

## TAYLOR V. HALL.

*Injunction—Untaxed costs of former motion—Amendment, service of notice containing.*

A motion by the plaintiff to continue an *ex parte* injunction was refused, with costs, but at the same time leave was given to amend the bill, and another interlocutory injunction was granted *ex parte*. On the return of the motion to continue the latter, it was objected that the costs of the former motion which had not been taxed were not paid.

*Held*, that the non-payment was no objection to the motion being proceeded with.

The proposed amendments of the bill were set out substantially in the order for the injunction, which was served.

*Held*, that, as the defendant had thereby notice of the proposed amendments, the objection that the amended bill had not been served was not entitled to prevail.

Where there appeared to be a substantial matter to be tried and no irreparable injury would be done by preserving the subject matter of the suit *in medio*, an injunction restraining the defendant from dealing with it was continued to the hearing.

This was a motion to continue an interim injunction which had been granted by the Chancellor under the circumstances stated in the judgment.

Mr. *J. H. McDonald*, for the plaintiff.

Mr. *A. Hoskins*. Q. C., contra.

The cases relied on are mentioned in the judgment.

FERGUSON, J.—This cause, it appears, came on for hearing before the learned Vice-Chancellor *Proudfoot*, last spring, at St. Catharines, when, on the application of the plaintiff, an amendment, of which notice had been given, was allowed, and the cause stood over to be brought on for hearing in the usual way, the plaintiff paying the costs of that hearing. The evidence now contains a good deal of matter relative to what

Sept. 13th.

Judgment.

1881. did and did not take place at that time, but I do not consider this of any great consequence as far as this motion is concerned.

Taylor  
v.  
Hall.

On the 6th day of June, a motion was made before me for an *ex parte* injunction to restrain the defendant from removing, or selling, &c., certain chattel property then on the lands in Grimsby, which had been the lands of the plaintiff, and were by him exchanged by a contract and mutual conveyances for certain lands in the State of Kentucky, in the United States. This *ex parte* injunction was granted, although doubts were entertained as to whether, when the defendant was heard, it would be continued, the matter, upon the statements of the plaintiff's counsel and the affidavits, appearing to be of a pressing character, and the usual undertaking being given.

The motion to continue that injunction was refused, with costs, by the Chancellor, he being of the opinion that without certain other amendments of the bill it could not be sustained; but his Lordship made an order giving leave to the plaintiff to make these amendments, and granted another injunction to the plaintiff restraining the defendant, &c., until to-day, and until the motion to continue it should be disposed of. The motion now is to continue this last injunction to the hearing of the cause, &c., and for an order giving leave to amend the bill pursuant to the order so to do last above mentioned, without prejudice to the injunction. Mr. *Hoskin* contends that this motion cannot succeed because the costs of the former motion have not been paid. These costs have not been taxed, and counsel for the plaintiff offers to pay them forthwith after taxation. It is also contended for the defendant that the motion cannot succeed because the amended bill has not been served; and further, that on the merits the motion ought not to succeed, but that the injunction should be dissolved.

As to the costs of the former motion not having been

paid. In the case the *Erie and Niagara R. W. Co. v. Galt* (a), the learned Vice-Chancellor Mowat is reported to have said: "There seems to be no reported authority warranting an objection of this kind before the costs are taxed, and he refers to what is said in the note to *Killing v. Killing* (b), where it is stated to have been held by Sir John Leach that if the costs have not been taxed, non-payment is no objection. In *Belchamber v. Gianni* (c), relied on by the defendant's counsel, the costs were by order fixed at forty shillings, and were not paid. In *Harvie v. Ferguson* (d), the costs had been taxed, but it was objected that they had been wrongly taxed because the solicitor had not taken out his certificates, and the costs should have been only disbursements. This case was also relied on by the defendant's counsel.

1881.

Taylor  
v.  
Hall.

Now, as I understand, the order for the issue of this injunction, and the order refusing the continuance of the former one with costs, were made at the same time, so that there was not any opportunity to have those costs taxed and paid before the granting of this injunction. The party entitled to these costs seems to have made no effort to have them taxed. The other party has expressed his willingness to pay them as soon as they are taxed. To allow this objection to prevail might have the effect of defeating an important right, and under such circumstances I do not think I am bound to give effect to the rule invoked, nor do I think it strictly applies.

Judgment.

Then as to the amendment. The leave to amend is contained in the order granting this injunction. This order sets forth substantially what the amendments are to be, and was no doubt served. The complaint is that the amended bill was not served. This motion asks leave to amend the bill pursuant to the leave contained in that order without prejudice to the injunction. It is not stated why the amendment

(a) 15 Gr. 567.

(b) 6 Mad. 68.

(c) 3 Mad. 550.

(d) 1 Ch. Ch. 218.

1881. was not made in the meantime. I think, however, that there is power to grant this leave, and I am disposed to do it rather than run the risk of defeating what may be an important right of the plaintiff. I do not think the case of *Eby v. Wilson (a)*, applies, at all events with full force, for the bill contained no allegation in relation to the matters upon which the application was made, and was framed for a different purpose. Here the bill was framed for the purpose of getting an injunction, and though defectively framed for an injunction in relation to the personal property, the defendant has had full notice of the intended amendments, and that these amendments have been authorized. He is really not in ignorance of anything concerning the amendments. His objection is purely of a technical character, and I think it should not be allowed to prevail, though one cannot commend the apparently dilatory course pursued by the plaintiff in respect to the amendments.

Judgment. Then as to the merits. After having perused all the affidavits, papers, and examinations, which are somewhat voluminous, much more so than I think they might have been, I am of the opinion that there is a substantial question to be tried and determined between these parties. The case is a very peculiar one. The contract appears to have been entered into in a most peculiar way. The plaintiff's case is of course much narrowed by the fact of the conveyances having been executed. Under the authorities he may find that he will be driven to rely upon fraud or fraudulent concealment alone, but as the differences between the parties are to be determined and settled, it is well, I think, that I should not anticipate by expressing any opinion here, but leave the matter wholly to the Court at the hearing. It is enough that I am satisfied that there is a substantial question to be

tried, and that no irreparable mischief will take place by preserving the property *in medio* until that question is settled.

1881.

Taylor  
v.  
Hall.

The injunction will therefore be continued. I have been referred to the case *Penman v. Somerville (a)*, to shew that where the Court is in possession of a matter in which real estate is concerned, it will, if chattel property form part of the subject matter in dispute, deal with that also by injunction even where the chattels do not possess any special value, and I have no doubt that the Court can deal with these chattels, under the circumstances, by injunction.

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### BEATY V. SAMUEL.

*Trust for creditors—Secured creditors, right of—Creditors not scheduled under Insolvent Act 1875.*

The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge.

*Held*, that the debt under the chattel mortgage was not extinguished. A subsequent common law assignment for the benefit of creditors was made by the debtor of all his property to the defendant in trust to pay expenses, &c., and “to apply the balance in or towards payment of the debts of the assignor in proportion to their respective amounts without preference or priority.”

*Held*, that the plaintiff was entitled to sue for the whole debt, and therefore to share in the estate proportionately under the deed for the whole, and that he was not bound to value his security and rank for the balance only.

Hearing of motion for decree under the circumstances stated in the judgment.

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(a) 22 Gr. 178.

1881. Mr. *Beaty*, Q.C., for the plaintiff.

Beaty  
v.  
Samuel.

Mr. *D. E. Thomson*, for the defendant. The points relied on and the cases cited, appear in the judgment.

Sept. 13th.

FERGUSON, J.—The plaintiff is mortgagee under an indenture of mortgage bearing date the 2nd September, 1874, of certain leasehold property in the city of Toronto, to secure the sum of \$2,000, and interest. This mortgage was made by *George Harding*, the mortgagor, and contains his covenant to pay this \$2,000, and interest, and the time for the payment of the same has long since elapsed, and it is alleged that there is due and unpaid for principal and interest the sum of \$3,061, and this is not denied. It is also said, and not denied, that the plaintiff is a trustee of the moneys secured by this mortgage. Since the making of the said mortgage, *Harding*, the mortgagor, became insolvent, and an attachment was issued under the Insolvency Act of 1875, and the Acts amending the same, and the estate duly passed into the hands of an assignee in insolvency in the city of Toronto. A deed of composition and discharge was obtained, executed as required by the Acts, which was afterwards duly confirmed, and *Harding* obtained his discharge. It appears that the claim of the plaintiff was not in any way scheduled, or any reference made to it in the proceedings in insolvency. The plaintiff did not prove this claim, or take any part in the insolvency proceedings, nor does it appear that any notice whatever was served upon or given him, although it is said that he had knowledge of the fact of the insolvency of *Harding*, and that those proceedings were being had.

Judgment.

*Harding*, having become again embarrassed in his circumstances, executed on the 23rd day of May, 1881, a general assignment for the benefit of his creditors to the defendant, his assignee in trust. This assignment is upon trust to sell and dispose of all the

real and personal property of *Harding*, the assignor, and after providing for the payment out of the proceeds of certain expenses and charges, upon trust to apply the balance of the proceeds of the sale in or towards payment of the debts of the assignor, *Harding*, in proportion to their respective amounts, without preference or priority, with a provision that the trustee shall have the right to pay in full whenever he deems it advisable, any claims or debts which constituted a lien or charge upon any part of the assets; and upon trust, after payment in full of all claims of creditors, with interest, to pay over to the assignor *Harding* any balance there may be.

1881.

Beaty  
v.  
Samuel.

The defendant accepted the trust created by this assignment, and has sold portions of the estate, and has in hand the sum of about \$3,000 for distribution amongst the creditors of *Harding*, the assignor, under the provisions of the assignment, and is desirous of distributing the money amongst the parties entitled thereto, but says he is doubtful as to whether or not the plaintiff is entitled to a proportionate share of the same. It is said that the whole amount of the debts to be paid is about \$10,000, and the plaintiff says that he is entitled to receive out of the moneys so in the hands of the assignee the sum of about \$925.

Judgment.

This was a motion by the plaintiff for an injunction restraining the defendant from dividing or disposing of the assets of the estate without paying to the plaintiff his full aliquot part or share thereof without any rebate on account of the plaintiff holding the mortgage above referred to, &c.; but it was agreed by counsel that it should be changed into a motion for a decree, and the decree asked is (1) a declaration that the plaintiff is entitled to share in the moneys in the hands of the defendant as such assignee and trustee *pro ratâ* with the other creditors of the said *Harding*, notwithstanding the plaintiff's having the said mortgage security, the amount payable to the plaintiff to be settled by the

1881. Registrar if the parties differ about it. (2) An order for payment of the costs out of the fund in the hands of the defendant.

Beaty  
v.  
Samuel.

The defendant by his answer and through his counsel states that he is only a trustee, and is ready and willing to submit to and obey such order as may be made. Counsel for the plaintiff called attention to the nature of the bargain of a mortgagee, and the separate existence of the covenant and the pledge; referring to *Kellock's Case (a)*, and *Lewin on Trusts*, 7th ed., 443. He also contended that the plaintiff's claim is unaffected by the proceedings in insolvency as against *Harding*, citing *Palmer v. Baker (b)*, and *King v. Smith (c)*, and he relied upon the words of the assignment to the defendant, claiming to be a creditor, and that the amount owing to him is a debt within the meaning of the words "and to apply the balance in and towards payment of the debts of the said debtor (*Harding*), in proportion to their respective amounts, without preference or priority."

Judgment.

For the defendant it was contended that as the plaintiff had knowledge of the fact that proceedings in insolvency were being had in the year 1877, he then by his silence and inactivity assumed the position of a secured creditor, and is estopped from now making this claim, referring to *Re Beaty (d)*, *Ex parte Wilson (e)*, *Selkrig v. Doris (f)*; and that in any view of the case the plaintiff should value his security and rank on the fund for any balance only.

From a perusal of the cases referred to by the plaintiff's counsel and some others on the subject, and an examination of the sections of the Act of 1875, bearing on the subject, I think it quite clear that *Harding's* debt to the plaintiff was not discharged by the

(a) L. R. 3 Ch. App. at p. 776.

(c) 19 U. C. C. P. 319.

(e) L. R. 7 Ch. App. 490.

(b) 22 U. C. C. P. 59.

(d) 5 App. R. 44.

(f) 2 Rose, 291.



insolvency proceedings in 1877, and that the fact that the plaintiff had knowledge of these proceedings did not make any difference in this respect. A perusal of the judgment of Mr. Justice *Gwynne* in *Palmer v. Baker (a)*, is very convincing on this point. The judgment of Sir *W. Page Wood* (L. J.), in *Kellock's Case*, is very pointed and instructive on the question to be decided. Certainly the plaintiff has the right now, notwithstanding these proceedings in insolvency, to sue for and recover this debt, and, this being so, can it be said that he is not one of the persons meant in the deed of assignment under which the defendant is acting where the trust is "to apply the balance in or towards payment of the debts of the assignor (*Harding*), in proportion to their respective amounts without preference or priority." I think not, and I think the plaintiff is entitled to be paid the amount that he claims, if that is the proper proportion of the amount of the fund in the hands of the assignee, he, the plaintiff, ranking upon the fund for the whole amount of his debt unpaid, and I think the defendant will be fully justified in so paying the plaintiff. I think there is no substantial ground for the contention that the plaintiff is estopped by his conduct from making the claim that he now makes; the elements of such an estoppel do not, in my opinion, exist. The plaintiff cannot, I think, be compelled to value his security, and rank upon the fund for the difference between such value and the amount of his debt, only.

I think the plaintiff entitled to the decree asked for, which has been stated above. I think it right that the defendant should pay the plaintiff's costs out of the fund in his hands, and I am also of the opinion that the circumstances were sufficiently embarrassing to the defendant as a trustee to justify him in taking the course that he has taken, and his costs may be paid out of the same fund.

1881.

Beaty  
v.  
Samuel.

Judgment.

1881.

## LEE V. VICTORIA RAILWAY COMPANY.

*Receiver—Payment of current expenses—Extraordinary outlay.*

Although the duty of the Receiver of the gross proceeds and revenues of a railway, is to pay thereout all expenses necessary for the maintenance, management and working of the undertaking, he would not be warranted in expending the same in any extraordinary outlay ; and where an application was made by the Receiver to authorize the purchase of a large amount of rolling stock, the outlay in respect of which would require to be met by anticipating income, the Court [BOYD, C.] refused to sanction the expenditure.

This was an application on petition made by the Receiver for leave to buy new rolling stock for the company, and for power to pay for the same, and to pay a balance due on rolling stock already owned by the company, out of the earnings of the road. The plaintiffs were bondholders of the company, and had filed the bill in this cause on behalf of themselves and all other bondholders for a Receiver. The present application was resisted by the company.

Statement

The company were incorporated under 34 Vict. ch. 43, Ont., and were authorized to issue bonds to the extent of \$9,000 per mile, for the purpose of raising moneys for prosecuting the undertaking, and such bonds were declared to be a first and preferential claim and charge upon the undertaking, and the property of the company, real and personal, then existing, or at any time thereafter acquired ; and that each bondholder should be deemed a mortgagee and incumbrancer *pro rata* with all other bondholders, upon the undertaking and property of the company.

By the 41st Vict. ch. 58, the company were empowered to limit the issue of bonds to \$6,000 per mile. The plaintiffs were holders of bonds issued under the last Act, and two years' interest were in arrear.

The petition shewed that the company had leased certain rolling stock with the right of purchase ; that

the greater part of the purchase money was due and unpaid, and the company were unable to pay the balance, and that the lessors threatened to take steps to resume possession. It also stated that the business of the road had increased to such an extent that the company were unable to carry on the business offered, and that there was danger of business being diverted from the road.

1881.  
 Lee  
 v.  
 Victoria  
 R. W. Co.

Mr. *Cattanach*, for the defendants.

Mr. *A. Hoskin*, Q.C., for the plaintiffs.

BOYD, C.—The Receiver in this case is appointed by the Court to receive the gross proceeds and revenues of the railway company, and to pay thereout all expenses necessary for the maintenance, management, and working of the undertaking. The management of the road is not interfered with, but is left to the board of directors subject to this, that the Court, through its officer the Receiver, retains control of the expenditure. The position is anomalous, to some extent, owing to the absence of any power to appoint a manager, which, though conferred upon the Court in England, is not so here. This state of affairs does not prevent the concern from being carried on, but it may and does affect the schemes of the directorate to change or extend the business of the company, and to incur expenditure for that purpose, because the outlay of the revenue of the undertaking is subject to the supervision of the Court: *Ames v. Birkenhead R. W. Co.* (a), *Re Manchester R. W. Co.* (b), *Simpson v. Ottawa R. W. Co.* (c). Whatever expenditure is reasonably required for the working and maintenance of the undertaking, as a going concern in proper condition, should be sanc-

Judgment.

(a) 20 Beav. 332.

(b) L. R. 14 Ch. D. 645, 656.

(c) 1 Ch. Ch. 126.

1881. tioned by the court. The risk and responsibility of running the road involve considerations of serious moment, and all that is needful in the way of repairs and renewals, and all the equipment requisite to keep the line in such a state of efficiency as will serve the public, according to the manner of its being operated when interfered with by the Court, should probably be provided for out of the gross revenues.

Lee  
v.  
Victoria  
R. W. Co.

But different considerations arise when the proposal is, as here, to increase largely the rolling stock of the company, to incur an outlay which will have to be met by anticipating income, and thereby in effect postponing and delaying the bondholders, and when the scheme embraces a proposition to pay for the present locomotives at a price which appears to be more than they are worth. This application is opposed strenuously by all the bondholders as being against their interests. I cannot see that it is proper to compel the plaintiffs to submit to the purchase of the old locomotives, which **Judgment.** it is said are considerably worn out, at a price of some \$28,000: more than half of the whole amount which it is proposed to expend by the scheme under consideration. If this rolling stock is taken possession of by the lienholders, then it will be for the parties interested to consider whether it is better to purchase new locomotives, or to make arrangements for the hire and use of other engines. The scheme presented does not commend itself to my judgment, and I decline to sanction the contemplated expenditure.

Application refused, with costs in the cause to the plaintiffs.

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1881.

## KING V. DUNCAN.

*Insolvent debtor—Chattel mortgage—Collusion— Judgment on breach of covenant and on common counts—R. S. O. ch. 118.*

*L.* being in insolvent circumstances executed a chattel mortgage to *D.* who was cognizant of his state ; and shortly after the execution thereof, in collusion with the mortgagee, but against an expressed prohibition, made a delivery or pretended sale of the goods to one *M.*, which was contrary to the terms of the mortgage, and the mortgagee sued for breach of the covenant therein, adding the common counts ; the mortgage having then three months to run. *Held*, that the mortgage and judgment, so far as the covenant was concerned, were void, as being a fraud upon creditors.

The mortgagor was really indebted to the mortgagee upon an account, though the time for payment was extended three months by the mortgage.

*Held*, that the mortgagee was entitled to retain his judgment on the common counts as there was not any violation of the Act (R. S. O., ch. 118,) in the debtor when sued not insisting on the fact of the credit not having expired, or that the debt had been merged in the mortgage.

The plaintiffs filed this bill on behalf of themselves and the other creditors of the defendant *Large*, alleging that they were creditors of his as the holders of a promissory note made by him and liable as indorsers on his paper for a large amount. The bill, amongst other things, charged that *Large* had made a chattel mortgage of his property to the defendant *Duncan*, for an alleged consideration of \$2,000, and that the defen-  
Statement.  
*dant Duncan*, pretending that *Large* had been guilty of a breach of certain provisions of such mortgage, had taken possession thereof, and had also brought an action against him in the Court of Queen's Bench, for the purpose of enforcing payment of the alleged consideration of the mortgage, \$2,000.

The bill further alleged that by the fraud and collusion of the parties, *Duncan* and *Large*, a judgment had been obtained by *Duncan* for this sum, and that an execution had issued thereon and was placed in the

1881. hands of the sheriff, who had seized the interest of  
*Large* in the same property under such writ, and that  
 the same was advertised for sale by the sheriff.

King  
 v.  
 Duncan.

The bill further stated that *Large* was in insolvent circumstances, and that the effect of the goods being sold under the provisions of the mortgage would be to defeat the claim of the plaintiffs; and that even if *Duncan* had a valid claim against *Large*, which however they denied, it would give *Duncan* a preference over the plaintiffs and the other creditors of *Large*. The bill prayed, *inter alia*, for an injunction to restrain the defendant *Duncan* from proceeding upon such mortgage and judgment, or upon the writs of execution issued thereon, and from alienating or incumbering the property of *Large* in question in the suit.

Statement.

The plaintiffs thereupon moved, upon notice, for an injunction in the above terms, when (1st February, 1881,) an order was made by consent of parties directing the motion to stand over till the 15th of that month, and permitting the sale under the mortgage meanwhile to take place in accordance with the advertisement, *Duncan* undertaking to pay the moneys arising from the sale, less the costs of sale, into Court, to abide the further order of the Court.

The sale took place, and the proceeds thereof, with the exception above mentioned, were paid into Court.

Mr. *W. Cassels*, and Mr. *D. E. Thomson*, for the plaintiff.

Mr. *Moss*, and Mr. *A. H. Meyers*, contra.

PROUDFOOT, V.C.—On the 14th December, 1880, a chattel mortgage was made by *Large* to *Duncan*, covering everything in *Large's* business then existing or to be brought into it, payable in three months, unless the mortgagor should meanwhile endeavour to part with the goods. After this *Large* bargained, with *Duncan's*

consent, to sell the same to *Maclean*, but before delivery thereof *Duncan* consulted his solicitor and on his advice forbade the delivery to *Maclean*. The goods were, however, sent by *Large* to *Maclean* on the same day, after the prohibition. On the 5th January, 1881, a writ was issued at the suit of *Duncan* on the covenant in the mortgage, the breach being the sale to *Maclean*. An appearance was entered on the 8th of January; declaration delivered the same day; and plea of payment filed on 10th January. On the same day, a summons was obtained to amend the declaration; and on the 11th, the order was granted under which the plea of payment was struck out. Judgment was entered and execution issued on the 15th January.

1881.

King  
v.  
Duncan.

I think the evidence shews plainly enough that *Large* was insolvent, and *Duncan* knew it, and therefore that the judgment was void under the R. S. O., ch. 118, sec. 2, as against the creditors of *Large*.

And I cannot avoid the conviction that the delivery of the goods to *Maclean* was collusive, and for the purpose of effecting a breach of the covenant against parting with the goods, so as to give a cause of action on which *Duncan* might sue.

Judgment.

So far as the mortgage is concerned, and so far as the judgment on this covenant is concerned, I think they are not valid against the creditors.

But the judgment was obtained also upon the common counts in the declaration. *Large* was really indebted to *Duncan*, though the time for payment by the mortgage was extended to three months from 14th December, 1880. Under the decisions there would seem to be no violation of the statute in a debtor not taking advantage of a credit not having expired, or in his not insisting upon a merger of the debt, if there were any such merger; for the statute only avoids a confession of judgment, a *cognovit actionem*, or a warrant of attorney to confess judgment. It might have been reasonable to prohibit other modes of facilitating the

1881.

King  
v.  
Duncan.

recovery of judgment, as by abstaining<sup>g</sup> from making any defence in one suit, and allowing judgment to be recovered in the other, or by entering an appearance and making no further defence; or to have made a general provision against a debtor preferring a creditor where two suits are pending against him; but the statute, while remedying one evil, did not remedy the others.

Judgment.

“If the Courts go further in the same direction, what would it be but legislation?” per *Spragge, C.*, in *Labatt v. Bixell (a)*.

The judgment on the common counts would therefore seem valid.

Costs reserved till hearing.\*

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\* The money which had been paid into Court by *Duncan* to avoid the issuing of the injunction, was thereupon ordered to be paid out to him.



1881.

## NEEDHAM v. NEEDHAM.

*Practice—Arrest—Bail—Discharge of Sureties.*

Where the plaintiff in an alimony suit obtains a writ of arrest and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into Court, to be applied from time to time in payment of the alimony and costs : and

*Semble*, that upon such payment the sureties are entitled to be discharged from their bond.

Where, under a writ of arrest a caption takes place, the sheriff is entitled to a bond for double the amount marked upon the writ.

This was an application by petition of *Ellen Needham* the plaintiff in an alimony suit, setting forth that on the 3rd of May last, a writ of arrest had been sued out against the defendant, under which he had been arrested on the 5th day of the same month ; and after such arrest entered into and executed a bond to the sheriff, with one *Thomas Needham* and one *Henry McGuffin*, as sureties in the sum of \$600, conditioned in accordance with the provisions of section 9 of "An Act respecting arrest and imprisonment for debt," —(ch. 67, R. S. O.) and thereupon the defendant was discharged out of custody of the sheriff ; that by an order dated 27th June, 1881, the defendant was ordered, upon the plaintiff undertaking to go to a hearing at the then next sittings of the Court at London ; to pay to the plaintiff \$12.00, a month by way of interim alimony, and interim disbursements.

Statement.

The petition further stated that there was due and payable to the plaintiff under said order \$48, for interim alimony, and \$27.98 for interim disbursements up to the date of said order, which amounts, though well able to pay, the defendant neglected and refused to pay, and the same could not be recovered from him under writs of execution, as he had converted all his property into money and so disposed thereof that

1881. nothing could be found to be levied upon, and there was not any means by which payment could be enforced, except under the said bond.

Needham  
v.  
Needham.

The petition further stated that after putting in his answer to the bill of complaint, and in or about the month of July last, the defendant absconded from this Province, and continued to reside out of the jurisdiction of the Court for the purpose of hindering, delaying, and defeating the plaintiff in the prosecution of her said suit, and of avoiding the payment of the sums so due and payable to her, and of avoiding the process of the Court: that the plaintiff was desirous of examining the defendant upon oath touching the matters in question, and she could not safely reply to the defendant's answer or amend her bill without such examination.

The prayer of the petition, amongst other things, was, that the defendant and his said sureties might be compelled to pay into Court the sum of \$600, and that when paid in the same might be impounded for the satisfaction of plaintiff's claim and costs; that the amount then due to the plaintiff should be paid her out of such impounded moneys, and that all other sums to become payable to her, might from time to time be paid out of the same moneys; and that the plaintiff might under the circumstances be relieved from her undertaking to go to a hearing until after the defendant should submit himself for examination.

Statement.

The writ of arrest it appeared had been indorsed to take security in the sum of \$300.

*George Charlwood Jolly*, swore that on the 5th day of May, 1881, he did personally arrest and take the body of *Cephas Needham*, in the writ named, and at the time of such arrest served him with a true copy of said writ.

The condition of the bond entered into by the defendant and his sureties was, "that if the said *Cephas Needham* will perform and abide by the orders and decrees made or to be made in this suit, or will

personally appear for the purpose of this suit at such times and places as the said Court of Chancery may from time to time order, and will in case he becomes liable by law to be committed to close custody, render himself (if so ordered) into the custody of any sheriff the Court may from time to time direct, then this obligation to be null and void, otherwise to remain in full force and virtue.”

1881.  
 }  
 Needham  
 v.  
 Needham.

A letter of the 7th of September, from the defendant's solicitor, was produced, in which he stated, in answer to a letter from the plaintiff's solicitors asking him to accept service of the petition for the sureties, to the effect that the sheriff had taken a bond from the defendant and his sureties for \$600, that sum being double the amount authorized by the writ of arrest; and that subsequently the sureties, on discovering that they had given a bond for double the proper amount, rendered the defendant “to the sheriff in satisfaction and discharge of the \$600 bond, (that being the cheapest way of getting rid of it,) and entered into a new bond for \$300, the correct amount, which the sheriff now holds \* \* \* I will contend on the defendant's behalf, among other things, that the \$600 bond was never authorized by the writ, and is, under the circumstances, invalid, and that the \$300 bond is the only one in force.”

Statement.

Mr. *R. M. Meredith*, in support of the application.

Mr. *Bayly*, contra.

*Gott v. Gott (a)*, *Daniels*, C. P. (Perkins's ed.) p. 1710; *Richardson v. Richardson (b)*, *Beames' Ne Exeat* 97, were referred to.

BOYD, C.—The practice is well defined, that the bond is to be with two sufficient sureties in double the sum marked on the writ, (*Dan. Ch. P.*, 5 ed., 1559,) which is

(a) 10 Gr. 543.

(b) 8 Pr. R. 274.

1881. usually considered sufficient security for the protection of the sheriff (a). The first bond for \$600 was therefore perfectly regular, and the subsequent attempt to supersede by surrender of the defendant and the execution of a bond for half the amount was futile. The practice appears to be equally clear, that a breach has been committed in the present case by the failure to obey the order of the Court, directing the payment of interim alimony and costs: *Richardson v. Richardson* (b).

Judgment.

The third point discussed is covered by the authority of *Musgrove v. Medex* (c), in which, upon this condition being broken by the party, his sureties were ordered to pay into Court the sum for which the writ was marked. Mr. *Bayly* offered in this case to pay the \$300 into Court, but coupled with other conditions to which the plaintiff objected. This sum should be paid into Court forthwith and applied *pro tanto* in payment of the arrears of alimony and costs. The residue should stand as security for accruing alimony, and may be paid out to the plaintiff from time to time without further order: *Gott v. Gott* (d).

I do not think that I can entertain any application to discharge the bond, (as it has not been assigned,) in the absence of the sheriff, but as at present advised it seems to me the sureties are entitled to have this relief as to both bonds, after paying the \$300 into Court. The whole object of the process is to secure the plaintiff in the sum marked on the writ; and her best security is to have that amount in Court: *Baker v. Jeffries* (e), *Evans v. Evans* (f), *Dick v. Swinton* (g), *Jonas v. Tepper* (h), (a very strong case.)

The plaintiff is entitled to her costs against the sureties, and to be exonerated from the undertaking to go down to the next sittings at London.

(a) T. & R. 322.

(c) 1 Mer. 49.

(e) 2 Cox 226.

(g) 1 V. & B. 371.

(b) 8 P. R. 274.

(d) 10 Gr. 543.

(f) 1 Ves. Jr. 96.

(h) 28 L. J. Q. B. 85.

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DUMBLE V. THE COBOURG AND PETERBOROUGH  
RAILWAY COMPANY.

*Review—Fresh evidence.*

In applications to open up proceedings by way of review on the ground of newly discovered evidence, it is necessary for the party applying to establish, (1) that the evidence is such that if it had been brought forward at the proper time it might probably have changed the result; (2) that at the time he might have so used it neither he nor his agents had knowledge of it; (3) that it could not with reasonable diligence have been discovered in time to have been so used; and (4) the applicant must have used reasonable diligence after the discovery of the new evidence.

Where, therefore, a railway company in the construction of their road took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor, and under the decree a sum of \$1,800 was found to be the value of such plot, which sum, together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company; and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously paid a prior owner of the land for a portion thereof:

The Court [FERGUSON, J.,] refused the relief asked with costs, on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment.

This was a petition presented by *The Cobourg, Peterborough, and Marmora Railway and Mining Co.*, and *The Grand Junction R. W. Co.*, under the provisions of General Order 330.

The petition stated that in the month of September last, the plaintiff presented a petition wherein he alleged, amongst other things, that he had been for some years and was then the owner of a parcel of land known and described as block N, in the village of Ashburnham, in the county of Peterborough, and that *The Cobourg, Peterborough and Marmora Railway and Mining Co.* ran their line of railway over and across this land, and had constructed and completed their railway over the

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1881. same. That in March, 1877, he, the plaintiff, had filed his bill of complaint against the defendants *The Cobourg Company* and *William Oliver Buchanan*, and such proceedings were thereupon had that in October, 1877, a decree was pronounced whereby the *Cobourg Co.* was directed forthwith to proceed to an arbitration, in the manner provided by the Railway Act, to determine the amount of compensation and damages that he, the plaintiff, was entitled to in respect of the damage done to the said lands by the company, and that in the said petition the plaintiff alleged that it was further ordered by the said decree that in the event of the said company not paying what, if anything, might be awarded to the plaintiff within one month after the award made and published, the plaintiff should be at liberty to apply to the Court for an order compelling payment thereof; and that thereafter an arbitration was held and an award made directing the company to pay to the plaintiff \$1,800 and the costs of the arbitration, amounting to

Statement. \$92, and that that award was a unanimous award of the arbitrators: and that the plaintiff, by the said petition, further alleged that in June, 1878, having presented a petition stating the facts above mentioned, he, the plaintiff, obtained an order directing the company to forthwith pay to him the said sum of \$1,800, interest and costs; and that the plaintiff in his first mentioned petition (presented in September last), further alleged that an arrangement had been made whereby *The Grand Junction R. W. Co.* were authorized to run over and use the said line of railway through the said land, and that they did so use the same, and prayed that it might be declared that he was entitled to a lien upon the said land so taken by the *Cobourg Company* for the amount of the said moneys, and that the petitioners might be ordered to pay the same, (being \$2,099,) to him, and that in default thereof the lands so taken, or a sufficient part of the same, should be sold, and that the petitioners, or one of them, should be ordered to

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pay the deficiency, if any, and for a receiver; and that upon that petition of the plaintiff, presented in September last, an order bearing date the 15th of December last was made, directing the payment of the sum of \$2,331.75 within one month: that payment was not made in pursuance of this order, and that on the 26th of February last there was offered for sale, at the town of Peterborough, that part of said block N lying west of the portion thereof formerly taken by the Peterborough and Chemong R. W. Co., for a railway track, and being a portion of the said block N, taken by the *Cobourg Company* for their Chemong lake extension, and describing the said parcel of land as about 400 feet by about 600 feet. The petition then stated that the *Cobourg Company* had in fact taken and appropriated for the use of their road and had constructed it across the whole of the said block N, from the south boundary thereof to the north-west corner, being a distance of 1091 feet, and that at the arbitration the plaintiff claimed compensation, and by the award of the arbitrators received it, for the value of the right of way for the whole of the distance, as is shewn by the evidence of the plaintiff and his surveyor and the plan then produced and proved by him before the arbitrators, but that the plaintiff only offered for sale a portion thereof lying west of the portion formerly taken by *The Peterborough and Chemong Company*, instead of offering for sale the portion of block N taken by the *Cobourg Company* for their Chemong lake extension.

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The petition then stated that the petitioners had recently, and after the presenting of the plaintiff's petition in September last, ascertained that the then owner of said block N, under whom the plaintiff claimed title, had formerly received payment in full of the price of that portion of the said lot taken by *The Peterborough and Chemong Lake Company*, and had actually conveyed it in fee to that company; and that

1881. at the time of the said arbitration the plaintiff had no title, or interest whatever in about one-half of the land in respect of which compensation was awarded to him. That the said sale did take place, and in order to prevent the land being purchased by a rival company, the petitioners *The Grand Junction R. W. Co.*, though in the name of Mr. *Bickford*, their managing director, bought the same for the sum of \$2,450. That the conveyance of the said right of way and land to *The Peterborough and Chemong Company* from the Hon. *G. S. Boulton*, the then owner, was lost or mislaid and was not registered, and in consequence of this the petitioners had no knowledge of the facts until the petitioners recently, and in the course of litigation with the Midland Railway Company in reference to the right of way, acquired such knowledge; that in such litigation it was determined that the said right of way formerly taken and paid for by *The Peterborough and Chemong Company* belonged to the Midland Railway Company, and the petitioners were ordered to deliver up possession thereof to them.

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The petition further stated that during all the proceedings up to the decree in the suit, the subsequent proceedings before the arbitrators, and until the commencement of the proceedings to bring the said lands to sale, the petitioners were in ignorance of the purchase of and payment for the said lands, as before set forth, and the arbitrators acted in awarding the sum they did to the plaintiff upon the impression and under the belief that no part of the said land had been purchased and paid for on behalf of the petitioners *The Cobourg Company*, and *The Peterborough and Chemong Company*. The petition also alleged that the value of the portion in respect of which compensation might have been properly awarded to the plaintiff did not exceed \$200, and that if the arbitrators had been aware of the facts they would have awarded a much smaller sum than \$1,800, and the petitioners expressed their



willingness to pay whatever might appear to be really payable to the plaintiff in respect of the land, and prayed that the decree pronounced in the cause and all proceedings, including the proceedings before the arbitrators and the award and all proceedings subsequent thereto and founded thereon, might be set aside; and that it might be declared that the plaintiff was only entitled to compensation in respect to the portion of the land not formerly purchased and paid for, and that it might be referred back to the arbitrators to award to the plaintiff only in respect of such portion, or that the plaintiff and the petitioners should be directed to appoint new arbitrators to proceed to award to the plaintiff in respect of such portion. That further proceedings in respect of the sale, or the enforcement of payment of the purchase-money might be stayed, and for necessary directions and accounts, general relief and costs.

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In support of the petition was filed an affidavit of Mr. *Bickford*, the general manager of *The Grand Junction R. W. Co.* This affidavit stated in detail, upon information and belief, the truth of the allegations in the petition, or most of them. The eighth paragraph of this affidavit was in these words: "The conveyance, as I am advised and verily believe, of the said right of way and lands to *The Peterborough and Chemong Railway Company* from the Hon. *G. S. Boulton*, the then owner, was lost or mislaid and was not registered, in consequence whereof *The Cobourg, Peterborough, and Marmora Railway and Mining Co.* and *The Grand Junction R. W. Co.* had no knowledge of the said facts, as I verily believe, until they recently, under the course of litigation in this honorable Court, between *The Grand Junction Company* and the Midland Railway Company of Canada, in reference to the said right of way, acquired the said knowledge." And the tenth clause of the same affidavit was in these words: "During all the proceedings up to the decree in this

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suit, the subsequent proceedings before the arbitrators, and until the commencement of the proceedings to bring the said lands to a sale, *The Cobourg, Peterborough, and Marmora Railway and Mining Co.*, and *The Grand Junction R. W. Co.*, as I am informed and verily believe, were in ignorance of the purchase of and payment for the said lands, as hereinbefore set forth, and the said arbitrators, as I am advised and verily believe, acted, in awarding the sum they did to the plaintiff, upon the impression and under the belief that no part of the said land had been purchased and paid for on behalf of *The Cobourg, Peterborough, and Marmora Railway and Mining Co.* and *The Peterborough and Chemong Lake Railway Company.*"

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The eleventh paragraph of the affidavit stated that the value of the portion in respect of which compensation might be awarded to the plaintiff did not exceed the sum of \$200, in the opinion of the deponent, and his belief that if the arbitrators had been aware of the facts they would have awarded a much smaller sum than \$1,800.

The notice indorsed on the petition stated the intention of the petitioners to read the depositions of the arbitrators *Pearce, Lowden, and Kempt*, to be taken in support of the petition, but these depositions were not, nor were any of them produced or read.

Another affidavit of Mr. *Bickford* was read, in which he stated that he authorized the purchase to be made on behalf of the *Grand Junction R. W. Co.*, and that after the purchase he ascertained that the plaintiff had caused to be sold only about half the land in respect of which he filed his bill and claimed compensation, as being taken by *The Cobourg, Peterborough, and Marmora Railway and Mining Co.* and for which and damages, the arbitrators awarded to him the sum for the recovery of which he instituted this suit, and that on investigation of the proceedings in the said arbitration, and of the facts of the case, he found that although the sum

awarded was for the value of the right of way through the whole lot, the predecessor in the title of the plaintiff through whom he claimed had previously received payment and made a conveyance to *The Peterborough and Chemong Company* of about one-half of the same right of way ; that the Midland Company claiming title through *The Peterborough and Chemong Company* had obtained a decree declaring them entitled to it, and that the petitioners had been ordered to deliver up possession to the Midland Company ; and that if the plaintiff received the purchase money now, he would receive himself, and through the former owner through whom he claimed title, payment twice over for about one-half of the land in question ; and that the petition was presented in good faith and not for the purpose of delay.

A copy of the evidence taken at the hearing of the cause was also put in, but it did not throw any light upon the question involved in the present application.

A copy of the evidence of the plaintiff before the arbitrators was put in, and it contained this passage : " I desire compensation for the land actually taken by the road, which contains an acre and three roods ; and also for the portion of the lot I. H. L. on plan B., containing one acre, and on the west side of the branch, towards the north end of the block, marked K., containing about a quarter of an acre." Another passage was as follows : " About three acres of my land has been taken and destroyed by the road, and a further portion depreciated in value ; and basing my calculations on sales already made, I claim compensation from the road in the sum of \$2,000. Land on the west side of the Otonabee river, immediately opposite this property, is worth \$2,000 an acre on the river side."

The plaintiff was examined on his affidavit and in his examination stated : " As a matter of fact, I think I have a paper title to the whole lot, including what has been taken by the *Chemong Company*. I

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1881. don't think I expressly claimed before the arbitrators for any specific quantity of land, nor for the part taken by the *Chemong Company*, nor for three acres of land, but I did claim for my land actually taken, and for damages to the portion injured. The reason I sold in this cause only the railway track west of the old Chemong line, was, because I didn't know that I could make a title to any more than that."

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The affidavit of the plaintiff in answer to the petition stated that when the *Cobourg Company*, in the year 1872, constructed their Chemong extension, they entered upon this block N, and for several hundred feet followed the course of the old Peterborough and Chemong Railway, and then turned to the west and passed diagonally through the portion of the block that lay west of that road; that in constructing their road they dug into land lying between the two blocks and made an embankment of the earth twenty feet high on the plaintiff's land; that they divided a three or four acre lot into two parts or triangles, of such a shape as practically to destroy their value, and that the great injury done to the plaintiff's land by the construction of the road was after it left the old Chemong track; that the length of the new line constructed outside of the old line is 560 feet by measurement; that the quantity of land taken for the new line for the actual right of way, wholly outside of the old Chemong track, and the land excavated and dug into for the purpose of making the embankment, together with the angles of land which were isolated and made useless, was more than two acres; that he had sold out of the same block N twenty lots at prices which realized \$800 per acre all round; that the price or compensation awarded him by the award in question was reasonable and not more than was fair; that at the arbitration the counsel, and the arbitrators viewed the land, and the *Cobourg Company* and their counsel were well aware and were always aware that a portion of the old Chemong track

had been used ; that he was no party to the contest between the Midland and the *Grand Junction* Railway companies ; that when the order of the 15th December last was made both these companies were represented by counsel ; that the *Cobourg Company* had been duly served with notice and were represented by counsel who, when it was proposed by counsel for the plaintiff to ask only for the sale of the land outside of the disputed portion, withdrew opposition and consented to the order for sale being made as it was made ; that the application for that order had been from time to time enlarged until the question pending between the *Grand Junction* and the Midland Railway companies should be determined, the enlargement on the 10th day of November last being for that especial purpose ; that an affidavit of the solicitor for the *Grand Junction Company* and an affidavit of the Hon. *Sidney Smith*—which were referred to as exhibits A. and B.—were used upon that application, and all the facts stated in the present petition and in the affidavits filed in support of it were known to the *Grand Junction* and *Cobourg Companies* before and at the time of the hearing, and when the order directing a sale in default of payment was made, which was on the 15th of December last, and the final order for sale was on the 18th of January last ; that the whole question raised by the present petition, and the affidavits in support of it, was before the Court on the occasion of the making of the order of Court on the 15th of December last ; that the land sold was wholly outside of the land in question between the two companies ; that it was taken possession of by the *Cobourg Company* about eight years ago, and by the *Grand Junction Company* last year ; that the question between the two companies was pending in the Court of Appeal ; that the damage done to him by the use of the small portion of the old Chemong railway track is very small, as that line was constructed about twenty years ago, and in his belief the arbitrators fixed the

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1881. amount of the award by the damage done to the land lying west of the old track ; that at the time of the sale Mr. *Bickford* instructed Mr. *Beck*, his solicitor, to offer to the plaintiff all his money if he, the plaintiff, would assign to the *Grand Junction Company* his claim in the suit, which offer was made and declined, and the land set up for sale, a Mr. *Cox* bidding \$2,400 and Mr. *Beck* \$2,450, when he became the purchaser, and signed the contract as the agent of Mr. *Bickford* ; that no motion was ever made to set aside the proceedings or to set aside the award ; that the sale took place on the 26th of February last, and that the *Grand Junction R. W. Co.* had, in the preceding October knowledge of all the facts they set up in their affidavits on the present application ; and that he had been baffled and kept out of the compensation in question for over seven years. The plaintiff also stated that, in his opinion, he had a good and proper title to the land in dispute between the companies.

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The affidavit of the solicitor of the *Grand Junction Company* referred to in the plaintiff's affidavit was sworn to on the 20th of October, 1880, and did shew that he then had knowledge of the fact now relied on by the petitioners of the sale of the land to *The Peterborough and Chemong Company*.

The affidavit of the Hon. *Sidney Smith*, also referred to in the plaintiff's affidavit, was sworn to on the 1st of December, 1880, and stated the fact of this sale, he being the purchaser on behalf of the company from Mr. *Boulton*.

Another affidavit of the plaintiff stated that the land sold was the identical land mentioned in the order for the sale, and was the land lying west of the land in question between the two companies, and was land that was taken for the first time for railway purposes by the *Cobourg Company* about the year 1872 for their *Chemong* branch. A copy of a map or plan of the place, made by Mr. *Clementi*, a P. L. S., apparently from a

survey made in January, 1878, was put in by the petitioners as the one that was used before the arbitrators.

By the references on the margin of this map it appeared that there was a very considerable embankment twenty-four links in height; that the land embraced by the new track was one acre and three roods; that the average depth of the excavation was four links; that the portion of the land isolated by means of the new railroad was one acre, and that the average cutting for the old road was fifteen links.

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Mr. *Hector Cameron*, Q.C., and Mr. *Moss*, for the petitioners.

Mr. *Watson*, contra.

FERGUSON, J.—[After stating the facts above set forth.] Sept. 2nd.

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It appears to me that the surveyor must have made a mistake in regard to the quantity of land embraced by the new track, for in any way that I can make the calculations it is not the quantity embraced by the railway track across the block, or the quantity in what is called the new track. The evidence of Mr. *Jonathan Stevenson*, the assessor of the village of Ashburnham, was also used in support of the petition. He produced the assessment rolls for several years, and gave some evidence of value; but, after a careful perusal of the whole, I do not think it affords any satisfactory test as to the value of the lands in question, or the amount of damage actually sustained by the plaintiff, and this seemed the only purpose for which, so far as I can see, this evidence was given. The witness speaks of the value, in one part of his evidence, of the plaintiff's land as compared with other lands, but, when cross-examined, it appears that he was speaking of the value after the damage had been sustained and there was not any good way

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of getting access to it. At the argument papers used on the former applications referred to in the petition were freely referred to by counsel on both sides and a large number of such papers were left with me. I have perused them all with care, but find them too numerous and voluminous to refer to them here, besides many of them are of little or no importance on this application. In one of these, however,—an affidavit of the plaintiff, sworn on the 15th of December, 1880, filed on the same day and manifestly used on the application for the order of that date,—this passage occurs: “The arbitrators saw the old Chemong track on the map before them at the hearing and on the ground. The same was fenced and divided off with the original fence built by the company.”

Judgment.

This petition is one in the nature of a bill of review on the ground of having discovered some new evidence, and the case of *Hoskin v. Terry (a)*, seems to be a leading if not the leading case on the subject. That case was an appeal to reverse an order made by the Supreme Court of the colony of New South Wales; and Lord *Kingsdown*, who delivered the judgment of the Court, said: “The rule which we collect from the cases cited in the argument is this, that the party who applies for permission to file a bill of review on the ground of having discovered new evidence, must shew that the matter so discovered has come to the knowledge of himself and of his agents for the first time since the period which he could have made use of it in the suit, and that it could not with reasonable diligence have been discovered sooner; and secondly, that it is of such a character that if it had been brought forward in the suit it might probably have altered the judgment.” And after commenting on the evidence in that case, his Lordship repeated the language of Lord *Eldon*, in *Young v. Keighly (b)*, which was as follows: “The

(a) 15 Moore's P. C. C. 493, 8 Jur. N. S. 975, (1862).

(b) 16 Ves. 348.



evidence, the discovery of which is supposed to form a ground for this application, is very material, and I am persuaded that by refusing this application I decide against the plaintiff in a case in which he might perhaps with confidence have contended that upon the evidence he was entitled to the whole money: on the other hand it is most incumbent on the Court to take care that the same subject shall not be put in course of repeated litigation, and that with a view to the termination of suits the necessity of using reasonably active diligence in the first instance should be imposed upon parties; the Court, therefore, must not be induced, by any persuasions as to the fact that the plaintiff had originally a demand which he could clearly have sustained, to break down rules established to prevent general mischief, at the expense even of particular injury."

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In the case of *Thomas v. Rawlings (a)*, the Court said that a petition for leave to file a bill of review on newly discovered evidence cannot be sustained by an affidavit on information and belief. The authorities I think, are clear as to the necessity, in an application of this kind, of three things being shewn by reasonably strong evidence. 1st. That the newly discovered evidence is such that if it had been brought forward at the proper time in the suit or matter it might probably have changed the result: 2nd That at the time when the applicant might have made use of it in the suit or matter neither he nor his agents had knowledge of such evidence: and 3rd, That it could not with reasonable diligence have been discovered in time to be so used. And another proposition is also clear upon the cases which is this, that the applicant must have used reasonable diligence after the discovery of the new evidence or his application will be refused.

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There does not appear to be any evidence whatever

(a) 34 Beav. 50, (1864).

1881. that at the time of the hearing of the cause the *Cobourg Company* and their agents were ignorant of the fact that the portion of land spoken of as being part of *The Peterborough and Chemong Railway Company's* track had been sold and conveyed to that company, and for anything that appears that may have been a fact known to the agents of that company, who were acting in the defence of the suit.

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Counsel for the petitioners were apparently forced to admit on the argument that there had been negligence on the part of the *Cobourg Company*, and it is possible that they neglected to avail themselves of this knowledge. It was argued by counsel for the petitioners that the *Grand Junction Company* were not answerable for the neglect of the *Cobourg Company*, and that the neglect or want of diligence of the *Cobourg Company* could not be made available against the *Grand Junction Company*, who are lessees of the *Cobourg Company*, deriving title from them at a very recent period, long after the hearing of the cause, and long after the arbitration and the making of the award. I do not perceive the ground on which that argument stands, and I am of the opinion that the *Grand Junction Company* have not any better right or title than the *Cobourg Company* had at the time of the contract or arrangement between the two companies, and that whatever would be a good answer to the petition, so far as the *Cobourg Company* are concerned, would also be a good answer to the same petition so far as the *Grand Junction Company* are interested. I cannot see how this can be otherwise, for, amongst other reasons that might be assigned, the arrangement between the companies was made pending the litigation, and the doctrine *lis pendens* applies so far as title to the land is concerned or may be in question.

Judgment.

The petitioners were, without doubt, I think, bound to shew affirmatively that at the time of and before the hearing of the cause, and at the time of the arbi-

tration, the *Cobourg Company* had not any knowledge or notice of the fact upon which the petitioners now place reliance. This there has not been even an attempt to do. On this point the affidavit of Mr. *Bickford* cannot, I think, be considered evidence. He is the manager of the *Grand Junction Company*, who had not at that time, so far as appears, any interest in the matter. It is not shewn that he had then, or has now any connection with the *Cobourg Company*, and besides, an affidavit founded on information and belief such as Mr. *Bickford's* is, so far as it has relation to a matter of this kind, wholly insufficient, as is shewn by the authorities. It appears to me that the authorities I have referred to shew that the petitioners' case, for relief is defective at the outset. This difficulty seems to lie at its very threshold. The burden was plainly on the petitioners to shew this, and, so far as I can perceive, they have wholly failed so to do; surely, on this point, the agents who were then acting for the *Cobourg Company* should have been examined, or affidavits procured from them, or at least some evidence given to shew that this testimony could not be procured. I think I must assume that these agents and other agents of this company, at and before the time, were unwilling to give such testimony or it would have been procured and made available. At all events, the burden of shewing this was upon the petitioners and they have not done so.

Then, it is shewn by evidence that is not denied, that at the time of the arbitration the *Cobourg Company*, by their counsel, were aware of the existence of the track of *The Peterborough and Chemong Company* constituting a portion of the track of the *Cobourg Company*, for the counsel and the arbitrators saw this track upon the ground, and also represented on a map that was used at the arbitration. This was notice sufficient, I think, to be the cause of inquiry as to the condition of the title, but there is not any evidence to

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1881. shew such inquiry was made, and, from the aspect of the whole case, it appears to me that if any inquiry had been made the information would have been obtained which might have been made available before the arbitrators; or if not, action could have been taken upon it within a reasonable time.

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Again, after the information was obtained, and after the time that the affidavit was procured from the Hon. *Sidney Smith*, there was, I think, negligence on the part of both companies. With this knowledge they seem to have stood quietly by, and permitted an order to be made for the sale of the land, and from the tenor of Mr. *Bickford's* affidavit it seems to me that it was expected that the whole of the land would be sold, and that there was disappointment because it was not. Although the time after the procuring of Mr. *Smith's* affidavit and before the presenting the petition was not, as compared with the time since the arbitration, a very long period, yet the petitioners stood by and permitted a very important fact to take place without moving in the matter.

I think that it is shewn by the authorities to which I have referred that the evidence adduced by the petitioners in support of this part of their case falls short of what the law requires.

Then the evidence does not at all satisfy me that the arbitrators did, in making this award, give to the plaintiff value or damages in respect of the portion of the land in question that had been taken by *The Peterborough and Chemong Company*. Beyond the conclusions of Mr. *Bickford*, founded on his investigation of the matter, and stated in very general terms on his belief, there is little or no evidence that this was done except what may be inferred from that which must, I think, be a mistake of the surveyor in his figures in the margin of the map which was used before the arbitrators; but the same map shewed by representation both lines of railway. Seeing this, and seeing both tracks on the ground, one would suppose that they and the

counsel and agents of the parties would assume that *The Peterborough and Chemong Company* had obtained their right of way in the usual and legal manner, and for this reason have excluded it, and whatever damages were occasioned by it, from consideration.

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Then the plaintiff is not accused of any fraud or improper conduct or intention in the matter, either now or then. The petition makes no such accusation against him, and counsel for the petitioners stated on argument of the petition that no such charge was made, or any idea of it entertained; and he, the plaintiff, in his evidence states his belief that the arbitrators did not make him any allowance for this land, or in respect of it, and that, in his opinion, he was not allowed by the arbitrators any more than was reasonable and right, and he gives very substantial reasons, indeed, for his opinion in regard to this last, by stating the quantity of land that was taken or "destroyed," as he puts it, and the average price for which he had sold other portions of the same lot. This, I think, is very strong evidence that his opinion is correct, or nearly so. I think I must prefer evidence given in this way to the opinion offered and conclusions stated on belief in the affidavit in support of the petition, and in this view there is reason to conclude that the petitioners' case should fail for want of the probability that had the evidence, said to be newly discovered evidence, been employed at the proper time, the result would have been different. The petitioners examined witnesses and put in verified copies of assessments, with the view apparently of shewing by inference that the land in question was not so valuable as was alleged and found by the arbitrators to be. I do not, from a perusal of these, think that, in the face of the direct evidence of the plaintiff and the reasons that he gives for his conclusions as to value, these reasons being wholly uncontradicted, this effort of the petitioners was successful.

Judgment.

1881. Mr. *Watson*, for the respondent, cited many cases to shew the difficulty in setting aside the award at this distance of time under such circumstances, and argued also that the petitioners were concluded by an alleged consent at the time of the making of the order for sale, but I do not think it necessary to consider these, as I think it clear upon the authorities and the evidence that the case of the petitioners fails, for the reasons I have mentioned.

Judgment.

I am therefore of opinion that the petition should be dismissed, with costs.

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1881.  
Dumble  
v.  
Cobourg and  
Peterboro'  
R. W. Co.

1881.

IN RE THE WELLAND CANAL ENLARGEMENT,  
FITCH V. MCRÆE.

*Valuation—Compensation to owner—Landlord and tenant—37 Vict. chap. 13.*

The government of Canada, having taken the land of the defendant's testator for the purposes of the Welland Canal, paid into Court, under the statute, a sum awarded by the valuers, intended to cover all claims which the owner might have of any kind. The owner was to be at liberty to remove buildings, &c., and on payment of the money to convey free from all other incumbrances, including taxes. The plaintiff was lessee of the property so taken, and claimed compensation for disturbance.

*Held*, that the plaintiff was entitled to be compensated out of the money paid into Court, and that his claim was one which the owner was liable, under Stat. 37 Vict. ch. 13, sec. 1, D., to pay, and which should have been taken into consideration, and which the evidence shewed had been taken into consideration in settling the amount to be paid by the government on taking possession of the lands.

This was an issue directed by an order of Court to be tried, and came on for trial at the Sittings held at St. Catharines in September, 1881.

Mr. *Rykert*, Q.C., for the plaintiff (*Fitch*).

Mr. *Cox* for the defendant.

Mr. *McCarthy* for the Dominion Government.

FERGUSON, J.—This matter arose out of a claim for October 4.  
compensation for lands of the late Mr. *McRae* taken Judgment.  
by the Government for the purposes of the enlargement of the Welland Canal.

The late Mr. *McRae* was the owner of the land, and the plaintiff *Fitch* was his tenant of the premises, or a part thereof, which was used for the purposes of an hotel.

1881. It appears that after much negotiation, an agreement was arrived at between the late Mr. *McRae* and the valuers for the government, which was, that \$5,700 should be paid as compensation. This agreement was completed on the 30th day of June, 1880, and was duly reported to the proper office by the valuers, on the 3rd day of July following. There had been a failure to agree, prior to this, which the valuers were about reporting, but did not, and which I need refer to only incidentally.

Re Welland  
Canal En-  
largement.

It appears that *Fitch*, the plaintiff in this issue, had made a claim against the government, in respect of this compensation: that it was referred to the same valuers to ascertain what proportion of the same should be paid to him, and what to *McRae* or his representatives; and in pursuance of this reference, the valuers found and reported that *Fitch*, the plaintiff, was entitled to \$466, and the estate of *McRae* to \$5,234. There being dissatisfaction, the Minister of Public Works deemed it advisable to pay, and did pay, the whole amount of the compensation, \$5,700, into this Court, under the provisions of 37 Vict. cap. 13, D. The matter came on apparently in the usual way, under sec. 2 of the same Act, on further directions, and this issue was then ordered to be tried, by an order bearing date the 6th day of September instant. The question ordered to be tried is, whether the plaintiff *Fitch* has any, and, if any, what claim to the said compensation money.

Judgment.

At the trial, it was admitted by counsel for the defendants in this issue, that the amount claimed by the plaintiff (\$466), was not an unreasonable sum, and that if it should be found that *Fitch*, the plaintiff, is entitled to any amount out of the \$5,700, this sum will not be complained of, so that the only question now to be determined is, whether or not *Fitch* has any claim at all in respect of this compensation.

By the agreement executed by the late Mr. *McRae* and the Government valuers, the money was to be



paid within 30 days from the date of it (the 20th June, 1880), or so soon thereafter as the title should be made satisfactory. The buildings of every kind were to be removed by *McRae*, and it was expressly stated that it was agreed and fully understood that this sum, \$5,700, was in full satisfaction of and for the value of the said land, and the expense of removing the buildings from off the same. This agreement contained a covenant to pay the money within thirty days, or so soon as the title was made satisfactory, and the covenant of Mr. *McRae* that he would immediately thereupon convey the land by a good and sufficient deed in fee simple, freed and discharged from all dower and other incumbrances, including taxes.

The report of the valutors to the Government states the items for which the \$5,700 was allowed, and item 10 C. is in these words: "All claims for damages for rents, loss of business, and every damage whatsoever, connected with said purchase and removal of all the said buildings"; and Mr. *Muma*, one of the valutors, who is now called as a witness, says this is correct. This witness says that the items that were mentioned by *McRae* during the negotiations as the basis of his claim were: the land, \$1,500; the cellar, \$1,500; cement, \$400; cost of moving, \$800; repairs, \$1,000; and incidentals, rent, &c., \$1000; making a total of \$6,200; and he produced a memorandum made at the time, shewing these items, and the total amount of \$6,200, which was the sum demanded by *McRae*. He says this sum was considered too much, but the valutors offered, first, \$5,300, and afterwards \$5,500.

He also says: "As I understood the offers, and as I explained them at the time, they embraced: 1, the land; 2, the moving of the buildings; 3, the damages claimed for cement and repairs; 4, the rent that *McRae* would lose by the unexpired term of the lease; 5, incidental expenses; and 6, any trouble that *McRae* might have in getting rid of *Fitch* the tenant." Before

1881.

Re Welland  
Canal En-  
largement.

Judgment.

1881. the parties finally agreed, they went to the office of Messrs. *Miller & Cox*, and the evidence shews that Mr. *Miller* was instrumental in bringing about an agreement as to the lump sum of the compensation, and settling the sum at \$5,700; but both Mr. *Muma* and Mr. *Miller* agree in saying that the various items making up the amount were not mentioned or discussed at the office of *Miller & Cox*. Mr. *Muma* says that he did say that the Government would settle any claim of *Fitch* up to the date of the agreement, but that it was there stated that there were two claims that *Fitch* might make, or would make, one which Mr. *Muma* (from a conversation with him, in which he had said he would take \$150, if freed from all overdue rent and settled immediately), supposed would be about \$150; and the other to be released from certain rent, amounting to a very considerable sum. Mr. *Miller*, called by the defendant, says that on the occasion when the lump sum was arrived at in his office, nothing was said as to how the claim of *McRae*, on the one hand, and the offer of the valutors on the other, were arrived at; that he knew nothing about this. He says, however, that it was understood and spoken of that the sum arrived at was not to embrace any claim for damages sustained or to be sustained by *Fitch* by reason of the government works; but that if *Fitch* was ejected or turned out of possession by *McRae*, so as to enable him to carry out his agreement with the government, then *McRae* was to pay *Fitch* or assume any damages that *Fitch* could shew he had sustained.

Judgment.

Mr. *Miller* also says that *McRae* was to get the whole of the \$5,700 for himself; but he also says that *McRae* was to give the land to the government free from all incumbrances; that he knew this, and that the lease was such an incumbrance or claim upon the land; that he was aware that the agreement was to give possession of the land within the thirty days; that he never thought that *Fitch* had any claim against

*McRae's* estate ; that he had no doubt that *Fitch* was injured, not by *McRae*, but by the employés of the government. He says that, had it been necessary for *McRae* to put *Fitch* out of possession in order to completely perform his contract with the Government, *Fitch* would have had a claim upon him, but inasmuch as *McRae* had not to do this, and it was done by the employés of the Government, there is no claim against *McRae's* estate. He says he did not ask *Muma* how he arrived at the amount that he offered, nor did he ask *McRae* how he arrived at the amount that he demanded.

It was contended by counsel for the plaintiff that parol evidence could not be given on the subject, inasmuch as there was a written agreement. No doubt this is the common rule, but the objection was first taken after the plaintiff had himself given parol evidence ; and the objection was afterwards waived at my suggestion. The parol evidence additional to that given by Mr. *Muma* and Mr. *Miller* was not very important. I have no doubt that both of these gentlemen gave their evidence in the most candid manner possible ; but I cannot but think that Mr. *Muma's* opportunity of knowing precisely what was intended by the transaction between *McRae* and the Government, was much greater than that of Mr. *Miller*, indeed Mr. *Miller* did not profess to understand the details of it ; and on the evidence, I think the proper conclusion is, that the claim of *Fitch*, the tenant, was in fact embraced in the \$5,700. Even had I not been of this opinion, I think I should have adopted the view taken by Mr. *Rykert* in his argument in respect to the meaning and effect of the first section of the Act. Mr. *McRae* made the agreement. He knew that he had this tenant. He was bound to know the law as stated in this first section ; and I think I should on the agreement and the statute have found the issue in favour of the plaintiff.

1881.

Re Welland  
Canal En-  
largement.

Judgment.

1881. The order directing the issue directs that the costs of this matter and of the issue, and of all questions as to the distribution of the compensation money, shall be disposed of at the trial of the issue.

Re Welland  
Canal En-  
largement.

The conclusion then at which I have arrived is, that the plaintiff, *Fitch*, is entitled, out of the sum of \$5,700, in Court, to the sum of \$466, and a proper proportion of the interest and accumulated interest; and that the representatives of the late Mr. *McRae* are entitled to the balance. I am not aware of any claim other than these two.

I think the defendant, the representative of the late Mr. *McRae*, should pay the plaintiff's costs and the costs of the Government of and incidental to the trial of this issue. Mr. *McCarthy*, representing the Government, said that the Government would pay the costs of the proceedings down to the issue, and there can be no doubt that this will be done.

Judgment. The costs to be paid by the defendant in the issue, may be deducted from the balance coming to her.

There being, as I understand, only the two claims the \$466, and the proper proportion of interest, as before stated, will be paid out to the plaintiff; and the balance of the money and interest will, after deducting the costs to be deducted as above, be paid out to the defendant in this issue.

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1881.

## GRIFFITH V. GRIFFITH.

*Will—Construction of—Vested estate—Dying before the age of 21.*

The testator expressed a 'desire "to have retained for my children my property on Yonge street ; and for this purpose I desire that the proceeds of my life insurance be applied in the purchase for my daughters' benefit of the incumbrances of that property. Under any circumstances, I desire that all my other lands be sold. \* \* I desire that the proceeds of my estate and rents of my Yonge street property be applied \* \* in the support, maintenance, and education of my two daughters, and in paying the incumbrances on the Yonge street property. After paying the necessary charges, my wish is, that the interest of my estate be applied by my trustees in the support of my children. Should one of my said two daughters die, or become a Roman Catholic, her share to go the other, and should both die without issue, or become Roman Catholics, then my estate is to go to my sister *L.* and her heirs. \* \* I direct that my trustees shall divide the proceeds of my estate equally between my two daughters, allowing each, during their minority, or until the marriage of one or other of them, a sum sufficient to maintain and educate them, and after they come of age an equal share of all proceeds to be secured and paid them, free from all control of any husband or any other person." There were only these two daughters, children of the testator, and both attained the age of twenty-one years without either having become a Roman Catholic.

*Held*, that the interests taken by the daughters were vested, though subject to be divested upon the happening of the events mentioned before twenty-one ; and that at that time the shares vested absolutely in them ; so that *L.* took nothing under the will.

This was a suit instituted to obtain the construction of the will of the late *John C. Griffith*.

Mr. *W. Cassels* for the plaintiffs.

Mr. *J. R. Roaf*, for the defendant *Walmsley*, the trustee substituted for *Robert T. Griffith*, the surviving executor and trustee.

Mr. *Ewart* for Mrs. *Liddell*.

The arguments and authorities cited sufficiently appear in the judgment.

1881.

Griffith  
v.  
Griffith.

FERGUSON, J.—The will of the late *John C. Griffith* bears date the 12th day of February, 1872; and the death of the testator took place on the 23rd day of the same month.

October 10.

Judgment.

The testator gave, devised, and bequeathed, all his estate, real and personal, to trustees, whom he appointed his executors, upon the trusts contained in the will; and directed the trustees to hold the whole of the same real and personal estate for the benefit of his two daughters “as hereinafter directed.” Then, after disposing of certain trinkets and “remembrances,” and directing the sale of his furniture, paintings, and other household personal property, and the application of the money arising therefrom, to the payment of current debts and his funeral expenses, the will proceeds: “My great desire is, to have retained for my children my property on the corner of Yonge and Shuter streets, known as 219 and 221 Yonge street, and for this purpose I desire that the proceeds of my life insurance be applied in the purchase for my daughters’ benefit of the incumbrances of that property. Under any circumstances, I desire that all my other lands be sold within five years from my death, by auction, but otherwise I give my executors and trustees the utmost discretion as to the time, manner, and terms of sale of any prior sales of any portions. I desire that the proceeds of my estate and rents of my Yonge street property be applied, after payment of my current debts and funeral expenses, in the support, maintenance, and education of my two daughters, and in paying the incumbrances on the Yonge street property. After paying the necessary charges, my wish is, that the interest of my estate be applied by my trustees in the support of my children. Should one of my said two daughters die or become a Roman Catholic, her share to go to the other; and should both die without issue, or become Roman Catholics, then my estate is to go to my sister *Mary Ann Liddell*, and her heirs.” Then,

after a revocation of all former wills, the testator proceeds: "I direct that my trustees shall divide the proceeds of my estate equally between my two daughters, allowing each during their minority, or until the marriage of one or other of them, a sum sufficient to maintain and educate them, and after they come of age an equal share of *all proceeds* to be secured and paid them free from all control of any husband or any other person." The will is then concluded by a small bequest to a faithful housekeeper. The case is on further directions. Both the daughters of the testator, who were his only children, have attained the age of twenty-one years. Neither has become a Roman Catholic. The chief question in contention, and apparently the only one of much if any importance, is, as to whether or not the sister of the testator, Mrs. *Liddell*, takes anything under the will.

Mr. *Cassels* argued that the devise and bequest to the plaintiffs is vested, but liable to be divested upon the plaintiffs dying without issue, or becoming Roman Catholics before attaining the age of twenty-one years, and that upon their attaining that age they became entitled to the estate absolutely, so that Mrs. *Liddell* cannot now be entitled to any thing under the will. He also argued, amongst other things, that the gift to Mrs. *Liddell* was bad for remoteness.

Mr. *Ewart* contended that if the failure of issue is a failure at a definite period, the estate to the daughters of the testator is one in fee simple, with an executory devise over in favour of Mrs. *Liddell*. And if the failure of issue is a failure at an indefinite period, then the estate of the testator's daughters is an estate tail; but that Mrs. *Liddell* will take under the will if the daughters become Roman Catholics at any indefinite period, not merely before they attain the age of twenty-one; and amongst other things, that the distribution at the age of twenty-one, mentioned in the will, means a distribution of the surplus of the interest, rents, &c., of the estate only, and not of the corpus.

1881.

Griffith  
v.  
Griffith.

Judgment.

1881.

Griffith  
v.  
Griffith.

Mr. *Roaf* asked that in the event of its being determined that Mrs. *Liddell* is now entitled to any interest under the will, certain moneys which have been taken from a fund to which the plaintiffs were absolutely entitled should be placed back, so as to prevent injustice. The authorities cited were: *Travis v. Gustin* (a); *Gould v. Stokes* (b); *Gray v. Richford* (c); *Little v. Billings* (d); *Jarman on Wills*, 498.

Judgment.

I am of the opinion that Mrs. *Liddell* is not now entitled to any interest under the will. The interests taken by the plaintiffs were vested interests, but subject to be divested upon the happening of the events mentioned. Looking at the scope of the whole will, I think that the words "should both die without issue, or become Roman Catholics," really mean should both die or become Roman Catholics, without issue, before attaining the age of twenty-one years. The preceding words are "should one of my said two daughters die or become a Roman Catholic, her share is to go to the other." One cannot, I think, reasonably arrive at the conclusion that the intention of the testator here was that upon the death of one of his daughters, at any time, perhaps leaving a large family of children, her share of the estate should go to the other daughter. Had the testator used here the words, die without issue, it might have been very different; but looking at the words that he did employ, and the context of the will, I cannot but think that the meaning and intention were, that should either of his two daughters die or become a Roman Catholic, before attaining the age of twenty-one, her share of the estate should go to the other; and I think the same kind of intention is to be imputed to the testator when he used the words immediately following, which have been before referred to. If the testator had intended that upon the death

(a) 20 Grant 106.

(b) 26 Grant 122.

(c) 2 Supr. Ct. R. 431.

(d) 27 Grant 353.



of one of his daughters, or upon her becoming a Roman Catholic, her share of the estate should go to the other, he would not have used the words "should one of my two daughters die," &c. There is no possibility or doubt as to the death of any person. It is—as Mr. *Cassels* said in his argument—an event that is certain to happen; and looking, as I have said, at the context, and especially at the period of division or distribution of "all proceeds," (and those words are, I think, to be taken in their largest sense), when the daughters come of age, that they are to be maintained and educated up to that period, and then "an equal share" to be "secured and paid" to them, free from the control of any husband, or any other person, I am led to the conclusion that the actual intention of the testator was, that at this period his estate should go absolutely to his children, these two daughters, and that his endeavour was to provide for the cases of death or death without issue before twenty-one, or a change in the religion of his children before the same period, and whilst their minds might, and would naturally, be more easily changed, impressed, or moulded, upon this important subject, than in after and more mature years.

In this view of the case Mrs. *Liddell* cannot now have any interest under the will, and it is not necessary to say anything as to the moneys spoken of by Mr. *Roaf*.

1881.  
Griffith  
v.  
Griffith.

Judgment.

1881.

## TRAVIS V. BELL.

*Fraudulent conveyance—Costs.*

In a suit to set aside a conveyance on the ground of want of consideration, it was alleged that the grantor was bodily and mentally infirm, but the evidence shewed that the only difference between the grantor and grantee was, that the former was an older man than the other. The grantee, however, had given about the full market value of the land conveyed, and to secure part of the purchase money had executed a mortgage thereon. In dismissing the bill the Court [FERGUSON, J.,] directed the costs of the defendant to be deducted from the amount due under the mortgage, if the costs were not paid within a month, it being alleged that the next friend of the plaintiff was worthless.

This cause came on for the examination of witnesses and hearing at the Sittings held at St. Catharines in September, 1881, the facts giving rise to which, and the points involved, are clearly stated in the judgment.

Mr. *Ewart*, for the plaintiff.

Mr. *S. H. Blake*, Q.C., for the defendant *Bell*.

Mr. *McClive*, for the defendant *Shaw*.

October 11. FERGUSON, J.—The bill is to set aside a conveyance of the south half of lot number two, in the second concession of the township of Pelham, in the county of Welland, on the grounds, substantially, that the plaintiff, who made the conveyance, was, at the time he executed the same, of extreme age, much enfeebled in  
Judgment. body and mind, of weak intellect, and liable to be imposed upon by others; and that the defendant *Bell* fraudulently, and in the execution of a fraudulent design conceived by him, took advantage of this weak bodily and mental condition of the plaintiff, and by persuasions, importunities, and misrepresentations, procured the execution of the conveyance, giving for the land only the small sum of \$24.

It appeared by the evidence that as long ago as 1850, this plaintiff made his will, by which he gave a farm of 133 acres to his son *John*, another farm of 133 acres to his son *Dennis*, and to his son *Peter* the south halves of lots numbers one and two, in the second concession of Pelham ; this south half of two being the land comprised in the conveyance which was sought to be set aside, and that these devises were subject to the payment of certain legacies mentioned in the will.

On the 17th of August, 1876, the plaintiff made a conveyance in fee of these two half lots to his son *Peter*, and a lease for the lives of the plaintiff and his wife, *Charity Travis*, was given back by *Peter*. There appears to be some discrepancy in regard to the date of this life lease ; but it was conceded at the hearing that such was substantially the condition of the title at that time.

*Peter's* wife, *Lydia*, brought an alimony suit against him, about which there appears to have been a good deal of trouble, and on the 20th day of July, 1878, *Peter*, by a deed of grant, conveyed these same two half lots to his father, the plaintiff, for the expressed consideration of \$2,000 ; and it is scarcely denied that this conveyance was made for the purpose of defeating *Lydia*, the wife of *Peter*, should she succeed in establishing her alleged claim against him. Judgment.

This alimony suit was compromised in some way, it did not appear how, and another one had been commenced by *Lydia*, before the time of the execution of the conveyance which is now sought to be impeached.

In October, 1878, these two half lots were advertised for sale in the newspaper "*Weekly News*," St. Catharines, by *Peter*, who appears to have been living upon the land. This was after the conveyance of it to his father.

This advertisement was seen by the defendant *Bell*, who was the owner of land abutting on the fifty acres, the south half of lot number two, the conveyance of which is now in question. Some time after this, and

1881.

Travis  
v.  
Bell.

1881. as the evidence shews, about one year before the transaction sought to be impeached, *Bell* offered *Peter* \$2,000 for this half Lot if he would make him a clear title, and *Bell* does not now say that the land was not worth \$2,000 to him, if free from all incumbrances and defects of title.

Travis  
v.  
Bell.

The other fifty acres, the south half of lot one, has been conveyed to *Sarah Collis*, a daughter of the plaintiff, and nothing more need be said about it here. This conveyance bears date the first day of April, 1880. The conveyance in question here, bears date the 16th day of March, 1880, and the plaintiff by his bill alleges that he was then the owner of the land in fee simple. It appears that *Peter* was, as also was the plaintiff, very desirous that a final settlement should be effected with *Lydia*, *Peter's* wife. Before the transaction in question, *Peter* went to the defendant *Bell*, and told him that his father was willing to sell this land, and that he, *Bell*, had a chance of buying it.

Judgment.

He said his father was tired of contending with *Lydia*. *Bell* asked him the price, and he said his father and he had been talking it over, and that *Bell* could have it for \$1,200, and do the best he could with *Lydia*. At the suggestion of *Peter*, *Bell* went to see, and did see the plaintiff at the house of the defendant *Shaw*, who is the plaintiff's son-in-law. The plaintiff and his wife spoke of the law suit, saying to *Bell*, "You can do better with her (meaning *Lydia*), than any one else."

This offer was accepted by the defendant *Bell*, and he was requested by the plaintiff and his wife to settle with *Lydia*, as to the whole of the farm (both half lots), if he could, and they would do what was fair.

On the 27th day of January, 1879, the plaintiff had made a lease of the farm to one *Dobold*, for a term of five years from the 1st of April in the same year, and the sale to the defendant *Bell* was subject to this lease, the plaintiff to receive the rent during the term, but the interest upon a portion of that part of the purchase

money that was secured by mortgage, was not to begin to run till about the time of the expiration of the lease. On the 24th March, 1880, *Bell* procured a conveyance and release from *Lydia* of all her rights and claims of every kind in respect of both half lots for the sum of \$500, and on the 27th of the same month, he executed a mortgage for \$900 of the purchase money in favour of *Enoch Shaw*, a son-in-law of the plaintiff, and was allowed \$200 of the \$500 that he had paid *Lydia*, because he had succeeded in getting from her a release in respect of the other half lot, as well as this one, so that the price of this half lot was really \$1,500, but the place was subject to the *Dobold* lease, and it does not appear to me that the small allowance of interest upon certain instalments of the mortgage money that may be unpaid after a certain time, can be nearly equal to the use of the place for the unexpired period of the lease, to say nothing as to the inconvenience of having a tenant in the occupancy of land that *Bell*, when he made the offer of \$2,000, wanted to enjoy in common with his own land which abutted upon it.

1881.

Travis  
v.  
Bell.

Judgment.

The plaintiff made another will bearing date the 27th of January, 1879, whereby he devised these two half lots to *Peter*, the legal effect of which, as a matter of construction, would appear to be to give *Peter* an estate tail, with remainder in equal shares to the other children.

Such is an outline, though a brief one, of the dealing in respect of this land for some time, and the transaction sought to be impeached. So far as the charge of fraud, misrepresentation, or importunity, contained in the bill are concerned, I have no hesitation in saying that they are entirely unsupported by evidence. They remain, in my opinion, wholly unproved.

The evidence of several witnesses was given for the purpose of shewing that at the time of the transaction the plaintiff's mind was impaired, and that he was of

1881. weak intellect and liable to be imposed upon, as alleged in the bill.

Travis  
v.  
Bell.

I am of the opinion that the proof of the case for the plaintiff failed. If the plaintiff's evidence on this subject were left standing alone, I think the most that it would shew, even if the fullest credence were given to all the witnesses, would be, that the plaintiff was old, that he had been injured, more or less, or had complained of having been injured, more or less, at the time of a fire, by which his house had been burned; that he was sometimes physically sick, and at these times, owing to infirmities of the body, he had "spells" at which witnesses thought his mind was not so clear as usual; but neither the evidence of this, nor the evidence directed to facts—that is to say, what the plaintiff had said or done, or left unsaid or undone, as shewing an infirmity of mind—was such, in my judgment, as to induce any Court to act upon it, and, besides it was not even attempted to be shewn that the transaction sought to be impugned, took place during any of these alleged "spells."

Judgment.

For the defence is the evidence of *Jacob Kennedy*, a brother-in-law of the plaintiff, and on friendly terms with him, a conveyancer, the one who drew the conveyance and mortgage in this instance, who has done a good deal of writing for the plaintiff, probably all that the plaintiff has had done for many years, who appears to have drawn the will of 1850, and the other will spoken of, who has known the plaintiff for a long series of years, who appears to be a man of much intelligence, whatever his capacity for conveyancing may be, and from his conduct, one in whose sincerity the utmost reliance should be placed, and from what he says it appears to me impossible to conclude that the plaintiff was incapable of understanding or did not understand the transaction he was making, or that he was in any degree imposed upon by the defendant *Bell*, or any one else in the transaction. Then there was the evidence

of *Bell* himself. He was of course interested, but, from the way in which he told his story of the case I am disposed to accord him full credit, and from his evidence it is, I think, impossible to conclude that any advantage was taken of the plaintiff. I think the plaintiff was anxious to save the land for his son *Peter*, as against *Lydia*, *Peter's* wife. I think it was with this view he took the conveyance back from *Peter*, and with this view also that he proposed to make the transaction with the defendant *Bell*. In his evidence *Bell* says: "The next day I saw the old man. He said he did not consider her (meaning *Lydia*), entitled to anything. He was tired of contending with her. He told me that they had concluded to sell it, and he said 'You can do better with her than we can. You get a settlement of the whole, and we will do fair with you.'"

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Bell.

I cannot but think that the evidence shews that the plaintiff, though a very old man, was capable of understanding and did understand the transaction, and that he was not imposed upon at all; and I am of the opinion that the defendant *Bell* gave a consideration which was about the full value of the land. There was not any independent evidence to shew what the value of this half lot was at the time, and it must be borne in mind that *Bell's* offer shews only that he thought it worth \$2,000 to him, abutting, as it did, upon lands that he already owned and occupied. It is very probable that no other person could be found willing to give \$2,000 for it, and this offer of *Bell* was for it with an unquestioned title, and free from the *Dobold* lease; and even if the plaintiff were in a position upon the pleadings to urge inadequacy of consideration, I do not think that he ought to succeed upon the evidence.

Judgment.

Counsel for the plaintiff sought to urge that the parties were not upon equal terms, and to bring the case, on this contention, under some of the authorities but all that was in my opinion satisfactorily proved in

1881. this respect was that one was old and the other young,  
or at all events not so old.

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v.  
Bell.

I have examined with care the authorities referred to by counsel, and many others, including *Lavin v. Lavin (a)*, *Irwin v. Young (b)*, *Longmate v. Ledger (c)*, and I fail to see any ground upon which the plaintiff should succeed. I think it quite clear that he cannot succeed upon the grounds stated in his bill, and I think the bill should be dismissed, with costs; and I think the plaintiff should be ordered to pay the costs of the defendant *Shaw*, as well as of the other defendant.

Judgment.

Mr. *Blake*, for the defendant *Bell*, asked that he might be at liberty to deduct his costs from the mortgage money, alleging that the evidence shewed that the next friend of the plaintiff had not any property. I think an order to this effect may go, unless the plaintiff or his next friend pay *Bell's* costs within a reasonable time, say, one month.

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(a) 27 Gr. 567.

(b) 28 Gr. 511.

(c) 2 Giff. at p. 163.



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## LIVINGSTON V. WOOD.

*Judgment, amending decree to conform to—Costs.*

By the decree an assignment of a bond was declared to have been by way of security only; and further, that the plaintiff was entitled to certain credits, and referred it to the Master to take the accounts. In proceeding with the accounts the defendant was hampered by this declaration in the decree, as the Master felt bound by it, whereupon the defendant moved upon petition to amend the decree so as to make it conform to the judgment: FERGUSON, J., before whom the motion was heard, being of opinion that the judgment was directed solely to the fact that the bond was assigned as a security only, and that the view taken as to the credits was a ground for so holding, and was not a substantive part of the judgment, and therefore that the declaration as to the credits was unauthorized, ordered the same to be struck out of the decree upon payment of costs of the application, and of all additional costs incurred or to be incurred in the Master's Office, caused by the decree not having been properly drawn in the first instance.

This was a motion on petition to strike out of the decree drawn up in this cause a declaration therein that the plaintiff was entitled to certain credits, which are set out in the judgment.

The questions involved in the suit are sufficiently stated in the report of the case, *ante* volume xxvii., page 575, and in the judgment on the present motion.

Mr. *Gwyn* and Mr. *Hoyles*, for the motion.

Mr. *W. Cassels*, contra.

FERGUSON, J.—This is a petition presented by the Sept. 2nd. defendant, praying that the decree herein may be so amended as to be conformable with the judgment; that the value of a certain piano, the amount of a certain note, called in the proceedings the *Copeland* note, and a sum of \$500 being the amount of one of two drafts Judgment. of \$500, each mentioned in the proceedings, may be excepted from the credits which are by the decree

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declared to be due to the plaintiff in respect of the bond, which appears to have been the subject of contention and that, if necessary, it may be referred back to the Master to take the accounts upon the footing of the decree as amended; with a prayer for general relief.

The clause in the decree to which objection is now made, is in these words: "And this Court doth declare that the plaintiff is entitled to credit upon the said advances in respect of the payments made by him and set out in the fourth paragraph of the bill of complaint, and doth decree the same accordingly."

The suit seems to have been to compel the defendant to re-assign and re-deliver this bond to the plaintiff, it being contended by the plaintiff that the bond had been assigned to the defendant as a security only, and the defendant contending that the transaction was one of sale with the right of re-purchase. There were other contentions, but these were the principal ones, and the ones that are, I think, necessary to refer to here. The fourth paragraph of the bill of complaint, in effect, states that these three items: the piano (at \$350), the *Copeland* note (\$888), and the draft for \$500, above mentioned, were given to and received by the defendant upon the transaction now in question.

Judgment.

By the decree it was referred to the Master to take the accounts, and the Master (who made his report on the 27th day of May last) in taking the accounts held that he was bound by the declaration in the decree, and accordingly allowed these three items to the plaintiff.

There has been an appeal from the judgment to the Court of Appeal; and I have been favoured with a perusal of the appeal book and copies of the judgments of the learned Judges of that Court. The Court of Appeal affirmed the judgment of this Court and dismissed the appeal. The second reason for the appeal is framed upon the defendant's complaint in regard to these three items; but it must have been treated as

one of the reasons why the judgment of this Court should be reversed, and not as having any reference to the accounts, as such, for the judgments of the learned Judges of that Court are silent on the subject.

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The decree itself does not appear to have been before the Court of Appeal. It is nowhere found in the appeal book, which contains, in this respect, only the usual reference to the judgment, and where it is to be found in the reports of the Court (*a*), although according to the index of the book, one would expect to find the decree on the page where this reference is. There does not appear to have been any adjudication in the Court of Appeal respecting this declaration in the decree or the subject matter of it. The contention there seems to have been as to whether or not the plaintiff should have succeeded in his contention that the transaction was one of security, and not a sale, with the right of repurchase. I do not perceive that anything occurred in appeal to prevent this court from amending the decree as asked by the petition, if it is thought proper that this should be done and that there would, but for the appeal, be power to do it. Ordinarily an application of this kind would be brought on before the Judge before whom the cause was heard, and, no doubt, such would have been the course here but for his elevation to the Chief Justiceship.

Judgment.

In the petition, which is verified by the affidavit of one of the solicitors for the defendant, the petitioner states that the petitioner did not notice the effect of this declaration in the decree until the accounts were being taken in the Master's office, thus seeking to account for not having the decree properly settled according to the petitioner's present views. The petition is opposed by the affidavit of the plaintiff which treats more of the dealings between the parties, of the merits, and of what took place during the proceedings than of what

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(a) 27 Gr. 516.

1881. I conceive to be the precise points now to be considered. It has not been urged before me that the taking of the accounts by the Master, or the making of his report, in any way prevents the amendment of the decree, if otherwise it should be amended.

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I am of the opinion that there is power to amend the decree if it is not in accordance with the judgment, that is to say, if it is not the decree really pronounced by the Court, and I think that the question to be determined is, whether or not the judgment, as I find it reported, authorized the insertion in the decree of the declaration that is now complained of.

Judgment.

The learned Chief Justice says in the outset: "The question in this case is whether the assignment made by the plaintiff to the defendant, dated 27th May, 1872, was a security for money, or a sale with a right of repurchase." Shewing clearly, I think, that it was assumed by him that he had but the one question to decide. He then deals with the instruments constituting the contract between the parties, and apparently arrives at a conclusion favorable to the plaintiff's contention so far as the construction of these instruments is concerned. He then says: "I have been referred to the accounts and correspondence between the parties, and to their business paper. Some of the latter is material." Now, one inquires, material in what respect? The answer is, material in the consideration of the question which he is about to determine, which is the question before mentioned. The learned Chief Justice then proceeds with the consideration of their business paper to which he had been referred, manifestly with the view to seeing whether or not this and the evidence given with respect to it, would vary the conclusion at which he had apparently arrived upon the construction of the instruments of contract alone, and for no other purpose, I think. His Lordship, in conclusion, says: "I think the plaintiff entitled to succeed upon both grounds—upon the instruments taken to-

gether being properly construed as securities for a loan of money, and upon the dealings between them to which I have adverted.”

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The meaning of this, I think, is plain, and it is this: the plaintiff is entitled to succeed upon the one question, because upon the true construction of the instruments his contention is right; and because a consideration of the business paper, to which his lordship had been referred, and which he thought material, and of the dealings between the parties to which he had adverted, shewed the same result, or, at least, did not lead to the opposite conclusion.

In my opinion this judgment instead of determining two things, as contended for by the plaintiff, decides but the one question, placing the decision upon two grounds. The judgment then says, “the decree will be with costs. I suppose an account will be necessary,” and here it ends. The declaration in the decree which the petitioner now complains of is, I think, unauthorized by the judgment, and should not have been inserted in the decree; and I do not see, nor have I been shewn during the argument, any reason, that I think sufficient for depriving the petitioner of the right of having the decree amended upon proper terms. The decree will therefore be amended in accordance with the prayer of the petition, and the case referred back to the Master, unless the parties can agree, and the petitioner will pay to the plaintiff the costs of this application and all the additional costs incurred, or to be incurred, in the Master’s office above the amount of the costs that would have been incurred therein had the decree been properly framed in the first instance.

Judgment.

1881.

## KEEFER V. MCKAY.

*Will, construction of—Vested estate—Trustee for sale—Partition.*

A will contained a devise in trust for the support and maintenance of the testator's widow during her life or widowhood, with a direction that she should have the full right to possess, occupy, and direct the management of the property; and at her death or second marriage, "my son *Thomas*, if he be then living, shall have and take lot one, which I hereby devise to him." *Thomas* died before his mother.

*Held*, that he took a vested remainder in lot one.

The will further contained a devise of lots two, &c., to the testator's sons, *Alexander*, *John*, *Charles*, and *Thomas*, their heirs and assigns, as tenants in common, and a direction that the same should take effect from and after the death or second marriage of the testator's widow. There was a proviso that if any child died without issue before coming into possession of his share, the same should go to the survivors. An indenture was executed between the parties, conveying all the estate, &c., of those interested to *Alexander*, *John*, *Charles*, and *Thomas*, after the execution of which *Alexander* and *Charles* died. An Act of Parliament was subsequently passed confirming this indenture, and declaring that it should take effect from its date, and not be affected by the subsequent death of any of the testator's children; and it confirmed the estate in *John* and *Thomas* as tenants in common subject to the life estate of their mother; with the right of survivorship between them in case of one dying before the other without issue, before the death or marriage of their mother. After this, and in his mother's lifetime, *Thomas* died, having, however, survived his brother *John*, who died without issue.

*Held*, that *Thomas* took a vested remainder in fee expectant upon the determination of his mother's life estate.

The residue of the estate was directed to be converted, and to be at the disposal of the widow for her life, while she remained unmarried, and thereafter to the children. This was subject to the above proviso as to coming into possession.

*Held*, that the children took vested interests in the fund, subject to be divested on the happening of the contingency mentioned.

The plaintiff, being a trustee for sale, was held not to be in a position to ask for partition.

This was a suit by *Thomas C. Keefer* to obtain the construction of the will of the late Hon. *Thomas McKay*, and also of an Act of the Legislature of the Province of Canada, passed in the year 1861, for the

purpose of confirming a settlement which had been entered into by the several parties interested under the said will.

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The will and the Act of Parliament were as follow :

I nominate and appoint my wife *Ann Crichton*, and my sons *Alexander McKay*, *John McKay*, *Charles McKay* and *Thomas McKay*, and the survivors and survivor of them my executrix and executors of this my last will and testament, and do hereby authorize them to be and act as such beyond the period of a year and a day after my decease, and until the entire and perfect execution of this my will : Provided always, that in the event of my said wife marrying again, I will and direct that then and from thenceforth she shall cease to be such executrix, or in any way to meddle or intermeddle with the execution of this my will or the management of my estate, and be entirely divested of all trusts conferred or imposed upon her by this my will. And I further will and direct that the executors of my said executrix and executors, or any of them, except the last survivor of them, shall not be executors of this my will.

And I hereby will, devise and bequeath to my said executrix and executors, and to such of them as shall be alive at the time of my death, all and singular the moneys, debts, stocks, bills, bonds, mortgages, debentures, and other securities, goods, chattels and effects, lands, tenements and hereditaments, whatsoever and wheresoever situate, and all interest in the same of which I shall die possessed, and to which I shall be in any way entitled at the time of my death, in trust for the several uses and purposes hereinafter mentioned and declared, and to be by them held and applied and disposed of as hereinafter mentioned and appointed, that is to say :—

Statement.

*First*—For the payment and satisfaction of all my just and lawful debts, funeral and testamentary expenses, and the expenses of a vault or monument, which I hereby direct to be built or erected over my grave.

*Secondly*—For the payment of the sum of fifty pounds which I hereby bequeath to the Bytown Protestant Hospital, of which corporation I am a member, to be appropriated and laid out in such a manner as to the said corporation shall seem most advantageous, all which I will and direct to be paid and satisfied out of my personal estate as soon as conveniently may be after my decease.

*Thirdly*—In the event of my said wife surviving me, then, and in that case, in trust for the support and maintenance of my said wife so long as she shall live, and remain my widow and unmarried, and of my children so long as they shall respectively live and remain with my said wife, their mother, and until their separate establishment in life respectively. And I will and direct that my said wife so long as she shall live and continue my widow as aforesaid shall have the full right to possess, occupy, and direct the management of my said property, and every part thereof, and of the rents, issues and profits,

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interest and dividends thereof for the purposes aforesaid, and that my said executors in all things relating thereto shall be guided by her directions and commands, and in the event of my said wife marrying again after my decease, then for the payment of her yearly and every year during the remainder of her natural life by my said executors out of the rents, issues and profits, interest and dividends of my said property, of the sum of five hundred pounds annually, which in that event I hereby bequeath to her as an annuity, chargeable on my said property and estate, and payable as aforesaid, and in lieu of all dower out of my estate.

Statement.

*Fourthly*—In trust also that at the death or second marriage of my said wife, should such happen, my son *Thomas*, if he be then living, shall have and take lot number one, in the front concession on the Ottawa, of the township of Gloucester, in the county of Carleton, and province of Canada, containing two hundred acres, more or less (see deed from *Francis Sarague*), which I hereby devise to him, his heirs and assigns, to and for his and their own use for ever. And that my sons *Alexander*, *John*, *Charles*, and *Thomas* aforesaid, shall have and take all my other real estate in the township of Gloucester, namely, lots number two, three, four, and five, in the said front concession of said township (see deeds from *Henry Munro*, *Gideon Olmstead*, and *Clements Bradley*; also deed from government of lot number two), with all mills, houses, and buildings thereon erected. Also ten acres of land in the city of Ottawa, in said county, being a part of lot letter "O," in said city (except the part sold to *John McKinnon*, Esquire), with all mills, houses, and buildings thereon erected. Also Green Island, near the mouth of the Rideau River, in said county, with all mills, houses, and buildings thereon erected. All which I hereby devise to my said sons *Alexander*, *John*, *Charles*, and *Thomas*, and to their heirs and assigns, to and for their own use, for ever, as tenants in common, subject nevertheless to the payment of the legacies and annuities in and by this my will bequeathed and made chargeable thereon. And that my daughters *Ann*, *Christina*, *Jessie*, and *Elizabeth*, shall have and take all my houses, lands, tenements, and real estate, in the City of Montreal, which I hereby devise to my said daughters, their heirs and assigns, to and for their own use for ever as tenants in common. And I hereby will and direct that all the said devises in this section of my will mentioned and devised shall take effect upon, from, and after the said death or marriage of my said wife, and not sooner.

And all other my lands, tenements, houses, hereditaments, and real estate of what nature and kind soever and wheresoever situate, and as well in Great Britain as in Canada, in trust to be sold together or in separate parcels, or such part or parts thereof, and at such time or times, and for such sum or sums of money as to my said executors shall seem advisable, and the rents, issues, and profits, price and proceeds thereof to be at the disposal of my said wife so long as she shall live and remain unmarried, for the support of herself and my



said children, and after her death or marriage to be equally divided among my said children. And I hereby authorize and empower my said wife, so long as she shall live and remain unmarried, and after her death my eldest surviving son, legally to convey by deed of bargain and sale alone, and without my other executors, the whole or any parts of the said property which shall be sold by my said executors as aforesaid.

In trust also that at the death or marriage of my said wife, as aforesaid, all my personal property and estate then remaining shall be equally divided among my said children, either in money or in kind, as to my said executors shall seem best, allowing one year for the making of such distribution.

Provided always, and I hereby will and bequeath, that in the event of my said children dying without legal issue, before coming into possession of his or her share or shares of the property or money hereby devised or bequeathed, then the share or shares of such child or children to go to and be equally divided among the survivors, and the legal issue of such, if any, as shall have died leaving issue.

And in the event of any of my said children dying before coming into possession as aforesaid, and leaving legal issue, such issue in every case to take the portion or share which would have belonged to his, her, or their father or mother if then living. And to the husband or wife of each of my said children, who shall after marriage, and before coming into possession as aforesaid, die without issue, leaving such husband or wife, I give and bequeath the sum of fifty pounds annually as an annuity, payable out of and chargeable upon the share which would have belonged to such child if living.

And my silver cup presented to me by the late Lieutenant-Colonel *By*, as a testimonial of his regard and appreciation of the due performance of the contract of *McKay* and *Redpath* on the Rideau Canal, I give and bequeath to my said wife during her life or widowhood, and at her death or second marriage I give and bequeath the same to my youngest son then living.

All my books I give and bequeath to my sons *Alexander*, *John*, *Charles*, and *Thomas*, to be taken possession of and equally divided among them at the death or second marriage of my said wife.

*Fifthly and lastly*—I will and direct that in the event of my said wife dying before me, then and in that case my said property shall be disposed of at my death in the same manner as the same is hereinbefore directed and appointed to be disposed of at the death or second marriage of my said wife, in the event of her surviving me, so far as the same is practicable.

In testimony whereof I have to this my last will and testament, comprised in two sheets, set my hand and seal, to wit my hand at the foot of the first preceding sheet of paper, and my hand and seal to this second and last sheet, this eighth day of September, in the year of our Lord one thousand eight hundred and fifty-five.

(Signed) TH. MCKAY, [L. S.]

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1881. Signed, sealed, and published by the above-named Honorable  
*Thomas McKay*, the testator, as and for his last will and testament,  
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 McKay. in the presence of us, present at the same time, who at his request in  
 his presence, and in the presence of each other, have subscribed our  
 names as witnesses thereto.

(Signed) } ROBERT LEES,  
 DONALD M. GRANT.

An Act to confirm the settlement made under the will of the late  
 Honorable *Thomas McKay*, by the devisees therein named.

[Assented to 18th May, 1861.]

Statement

WHEREAS the Honorable *Thomas McKay*, late of the village of  
 New Edinburgh, in the county of Carleton, in Upper Canada,  
 heretofore a member of the legislative council for this province,  
 died on or about the ninth day of October, in the year of our  
 Lord one thousand eight hundred and fifty-five, having first made  
 and executed his last will and testament in writing, dated on or about  
 the eighth day of September in the year aforesaid, whereby he  
 appointed *Ann Crichton*, his wife, and his sons *Alexander McKay*,  
*John McKay*, *Charles McKay*, and *Thomas McKay*, and the survivors  
 and survivor of them, executrix and executors thereof, until the entire  
 and perfect execution of the same, and gave and devised to his said  
 executrix and executors, and the survivors and survivor of them, all  
 and singular the moneys, debts, goods, and chattels, lands and tene-  
 ments whatsoever and wheresoever situate, of which he the said  
 testator should die possessed, in trust for the purposes expressed in  
 the said will, and, amongst other things, in trust that, at the death  
 or second marriage of his said wife, his said sons should have and take  
 of the real estate of the said testator in the township of Gloucester,  
 in the said county of Carleton, lots numbers two, three, four, and  
 five, in the front concession on the Ottawa, with all mills, buildings,  
 and houses thereon erected; also ten acres of land in the city of  
 Ottawa, being a part of lot letter O in the said city (except the part  
 sold to *John McKinnon*), with all mills, houses, and buildings thereon  
 erected: also Green Island, near the mouth of the Rideau River, in  
 the county of Carleton, with all mills, houses, and buildings thereon  
 erected, all which the said testator devised to his said sons, and their  
 heirs and assigns, to and for their own use forever, as tenants in  
 common, subject nevertheless to the payment of the legacies and  
 annuities in and by his said will charged and chargeable thereon, and  
 in trust that at the same time (death or marriage of the testator's  
 said wife) his daughters *Ann*, *Christina*, *Jessie*, and *Elizabeth* should  
 have and take all his houses, lands, tenements, hereditaments, and  
 real estate in the city of Montreal, which he the said testator did  
 thereby devise to his said daughters, their heirs and assigns for ever,  
 as tenants in common, the said devisees to take effect from and after  
 the death or marriage of the said wife of the testator, and not sooner;  
 and the said testator by his said will directed that, in the event of

any of his said children dying without legal issue, before coming into possession of his or her share or shares of the property thereby devised, that then the share or shares of such child or children should go to and be equally divided amongst the survivors and the legal issue of such, if any, as should have died leaving issue, and that in the event of any of his said children dying before coming into possession as aforesaid, and leaving legal issue, such issue in every case to take the portion or share which would have belonged to his, her, or their father or mother, if then living : And whereas all of the said sons and daughters of the said testator survived him, and they were his only lawful issue and descendants at the time of his death, and it was by them then ascertained that the said will could not be carried into effect and was inoperative as respected the intended devise therein contained of the real estate situated in Lower Canada, and that it would be for their interest and benefit to give effect to such intended devise upon the terms and as mentioned in the agreement or indenture hereinafter mentioned. And whereas by the said agreement or indenture, which bears date on or about the thirty-first day of July, in the year of our Lord one thousand eight hundred and fifty-seven, and was made between the said *Alexander McKay, John McKay, Charles McKay and Thomas McKay*, of the first part, and *John McKinnon and Ann* his wife, *Robert McKay and Christina* his wife, *Thomas C. Keefer and Elizabeth* his wife, and *Thomas McLeod Clark and Jessie* his wife, thereto authorized by their said husbands, being the said daughters of the said testator, of the second part, after reciting the said will in part, and declaring that the same, by reason of its not having been attested before three subscribing witnesses, as required by the law of Lower Canada, was inoperative to pass the property in the city of Montreal by the said will devised to the said testator's said daughters, and that the said parties of the first and second parts had agreed to confirm, ratify, and make valid the said will that it might have lawful effect according to its words, both in Upper and Lower Canada, and as if it had been made and published before three subscribing witnesses, but that they, the said parties of the first part, or any of them, should not, in the event of any of the said four daughters dying before coming into possession of the property devised to them as aforesaid, without leaving legal issue, and leaving the said *Alexander, John, Charles, and Thomas*, or any of them surviving, claim the share or any part of the share of such daughter or daughters so dying without leaving legal issue, but should and would allow that such share or shares should be distributed among the survivors or survivor of the said four daughters, and the legal issue of such, if any, as should have died leaving issue, and be confined to such survivors or survivor of the said four daughters and the legal issue of such, if any, as should have died leaving issue, free of any claim, right, title, interest, or demand of them the said four sons, or any of them, respectively, or their or any of their heirs ; and that they, the said parties of the second part, or any of them, should

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—  
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1881. not thereafter, in the event of any of the said four sons dying before coming into possession of the property devised to them as aforesaid, without leaving legal issue, and leaving the said *Ann, Christina, Jessie, and Elizabeth*, or any of them, surviving, claim the share, or any part of the share, of such son or sons so dying without leaving legal issue, but should and would allow that such share or shares should be distributed to and be divisible only amongst the survivors or survivor of the said four sons and the legal issue of such, if any, as shall have died leaving issue, free of any claim, right, title, interest or demand of them, or any of them, respectively—it was by the same agreement or indenture witnessed that, for the considerations therein expressed, the said parties did thereby grant, bargain, sell, assign and set over unto the said *Ann McKinnon, Christina McKay, Elizabeth Kefer, and Jessie Clark*, authorized by their said husbands and accepting thereof, their heirs and assigns for ever, all the estate, right, title, interest and trust, claim and demand whatsoever, both at law and in equity, of them the said parties of the first part, and each of them, their and each of their heirs or assigns, of, in and to all the houses, lands, tenements, and real estate of the said *Thomas McKay*, in the city of Montreal aforesaid ; To hold the same to them, their heirs and assigns for ever, as tenants in common, so that neither the said parties of the first part, or any of them, their or any of their heirs or assigns, or any person or persons in trust for them or any of them, should or would, could or might, by any ways or means whatsoever, thereafter

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of the said parties thereto of the second part, or any of them, or any of their heirs or assigns, or any person or persons in trust for them or any of them, should or would, could or might, by any ways or means whatsoever, under the provisions of the said will or otherwise, thereafter have, claim, challenge, or demand any right, title, or interest of, in, to, or out of the said last mentioned lands, mills, buildings, tenements, hereditaments, and premises, or any of them, or any part thereof, but that they, the said parties thereto of the second part, and each and every of them, their and each of their heirs and every of them, from all estate, right, title, interest, property, claim, and demand of, in, to or out of the same lands, mills, buildings, tenements, hereditaments, and premises, or any of them, or any part thereof, should be for ever debarred ; which said agreement or indenture was duly executed, signed, sealed, and delivered by all the parties thereto, and by the said four daughters, in the presence of two justices of the peace, and has endorsed thereon the necessary certificates of examination of the said four daughters, as required by law : And whereas since the execution of the said agreement or indenture the said *Alexander McKay* and *Charles McKay* have departed this life, and never were married : And whereas the said *John McKay*, *Thomas McKay*, the said *John McKinnon*, and *Ann* his wife, the said *Robert McKay* and *Christina* his wife, the said *Thomas C. Keefer* and *Elizabeth* his wife, and the said *Thomas McLeod Clark* and *Jessie* his wife, have, by their petition, represented that the said agreement or indenture still is satisfactory to them, and that the said *Ann Crichton*, the widow of the said testator, has consented to the prayer thereof, such consent being endorsed upon the said petition, and further, that by reason of the contingency of the death of any of the said sons and daughters of the said late *Thomas McKay*, who now survive him, before coming into possession of his or her share of the said property, and leaving legal issue, the said agreement or indenture cannot be carried into effect so as to bind such issue without the authority of Parliament : And whereas the said petitioners have prayed for the enactments hereinafter contained, which it is expedient to grant : Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

1. The said agreement or indenture, dated the thirty-first day of July, in the year of our Lord one thousand eight hundred and fifty-seven, shall have effect, according to the true intent and meaning thereof, as and from the said day of the date thereof ; and the same was, is, and shall be good and effectual to all intents and purposes, both at law and in equity, to bind, not only the parties thereto, and their lawful issue, but all persons claiming or to claim by, from or under them or any of them, or either of them, so that such issue and all persons claiming or to claim by, from, or under them, or any of them, shall be debarred from setting up any claim, right, title, or interest of, in, or to the same property mentioned in the said agreement or indenture.

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2. All the legal and equitable estate, right, title, and interest of the said late *Thomas McKay*, of, in, and to the said landed property, in and by the said indenture granted and confirmed by the said four daughters and their said husbands to the said four sons, is in the said *John McKay* and *Thomas McKay* and their heirs, as tenants in common, subject, however, to the estate for life, or during widowhood, of their said mother, and with the right of survivorship between them in case one dies before the other, without legal issue, before the death or marriage of their said mother.

3. All the legal and equitable estate, right, title, and interest of the said late *Thomas McKay*, of, in, and to the said landed property in the city of Montreal, is in the said *Ann McKinnon*, *Christina McKay*, *Elizabeth Keefe* and *Jessie Clark*, and their heirs, as tenants in common, subject, however, to the estate for life or widowhood of their said mother, and with the right of survivorship between them in case any of them dies before the other or others of them without legal issue, before the death or marriage of their said mother; and without prejudice to the rights of parties who have already purchased from the said four daughters.

4. The said *John McKay* and *Thomas McKay*, by and with the consent and approbation of their said mother, testified by some writing under her hand and seal, are, by this Act, empowered to sell, mortgage, and dispose of the whole or such portions of the said lands by the said agreement or indenture conveyed and confirmed to them, as to them shall seem advisable, and execute all necessary conveyances thereof; and the proceeds arising from such sale or sales, mortgage or mortgages, may from time to time be invested in the permanent improvement of any part of the said landed property remaining unsold, or in such other manner as they may deem advisable.

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5. The said four daughters, with the consent and authority of their husbands, and also with the approbation and consent of their said mother, testified by some writing under her hand, are, by this Act, empowered to sell, mortgage, and hypothecate the whole or any part of the said landed property of the said testator situated in the city of Montreal, which was, by the said agreement or indenture, conveyed and confirmed to the said four daughters of the said late *Thomas McKay*; and sales already effected and deeds passed with such authority and consent are hereby ratified and confirmed.

6. This Act shall be deemed a Public Act.

*Thomas McKay*, the son, died on the 11th of November, 1865, having first made his will, by which he disposed of all his real and personal estate. The effect of this will was not doubted in any way; the only material question being what estate *Thomas McKay* took under the will of his father.

The cause came on to be heard before *Ferguson, J.* 1881.

Mr. *S. H. Blake*, Q.C., for the plaintiff.

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Mr. *J. Hoskin*, Q.C., for the infant defendants.

Mr. *Maclennan*, Q.C., Mr. *Rae*, and Mr. *Black*, for other defendants.

*Theobald* on Wills, 403-5, 477; *Jarman* on Wills, 759, 761, *et. seq.*, and cases therein referred to, were cited by counsel. Sept. 12.

FERGUSON, J.—The plaintiff, *Thomas C. Keefer*, is the surviving executor and trustee under the last will and testament of the late *Thomas McKay*, who derived title to a large part of his property under the will of his father, the late Hon. *Thomas McKay*, and by a certain Act of Parliament of the late Province of Canada, being 24 Vict., ch. 133, and entitled: “An Act to confirm the settlement made under the will of the late Hon. *Thomas McKay*, by the devisees therein named.”

The plaintiff's bill asks, amongst other things, that these two wills and this Act of Parliament may be interpreted, and the rights and interests of all parties interested ascertained and declared, and that a partition of the real estate of the late *Thomas McKay*, in accordance with the terms of a certain agreement, which is referred to in the fifteenth paragraph of the bill, may be declared to be for the benefit of the infant defendants, and decreed accordingly. Judgment.

The Hon. *Thomas McKay* died on or about the 9th day of October, 1855, and his will bears date the 8th day of September, in the same year.

*Thomas McKay*, the younger, died on or about the 11th day of November, 1865, and his will bears date the sixth day of November, in the same year. The first mentioned will, and the Act of Parliament, are as follows: [His Lordship read these documents.]

The chief contention before me was, as to whether

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the interest in lot number one in the front concession on the Ottawa, of the township of Gloucester, in the county of Carleton, taken by *Thomas McKay* the younger, under the will of his father, the Honourable *Thomas McKay*, was a vested interest or an interest contingent upon his surviving his mother, which he did not do, as she did not die until the 21st day of August, A.D. 1879. By this will the testator devised and bequeathed to his executrix and his executors—they being his widow and his four sons—all his property of every nature and kind, in trust for the several uses and purposes mentioned in the will. The devise of this lot to *Thomas McKay* is contained in the early part of the trust fourthly declared and set forth in this will, and in these words, “Fourthly: In trust also that at the death or second marriage of my said wife, should such happen, my son Thomas, *if he be then living*, shall have and take lot number one, in the front concession on the Ottawa, of the township of Gloucester, in the county of Carleton, and province of Canada, containing two hundred acres, more or less, which I hereby devise to him, his heirs and assigns, to and for his and their own use, for ever.” There are subsequent parts of the will which, it was contended, have a very material bearing upon this question, but I propose to consider, first, the effect of this clause, and afterwards what effect, if any, these subsequent parts of the will have upon it. It will be observed that by the preceding trust (that thirdly declared in the will), in the event of the testator’s wife surviving him, she is given the right to possess, occupy and direct the management of all the property of the testator for her support and maintenance so long as she should live and remain his widow and unmarried, and for the support and maintenance of the children so long as they should respectively live and remain with her, and until their separate establishments in life respectively; and that the duration of this interest given to the wife is precisely the

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same as that of the period mentioned in the devise to *Thomas*, namely, till her death or second marriage. Now, I think the rule applies, that, in the case of successive limitations, when there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent upon a condition essential to the determination of the interest previously limited, notwithstanding the words in form import a contingency, they mean no more in fact than that the person to take under the limitation over is to take subject to the interest previously limited. This rule and the illustrations of it, given in *Tudor's* Leading Cases, 834, and the cases there referred to, in my opinion show clearly that the interest that *Thomas McKay* would take by this devise is a vested and not a contingent interest, and would be a vested remainder in fee simple in Equity, in this lot number one, subject to the interest of his mother during life or widowhood. The same rule and many of the same authorities are found in *Theobald*, and in *Jarman* on Wills, at the pages to which I was referred by counsel during the argument, but, it is to my mind more clearly expressed in *Tudor*.

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One of the subsequent passages to which I have alluded is in the same trust (the one fourthly declared), and is in these words: "And I hereby will and direct that all the said devises in this section of my will mentioned and devised, shall take effect upon, from and after the said death or marriage of my said wife, and not sooner." It was contended that this passage in the will indicated that the interests taken were contingent, and that the interest taken by *Thomas McKay* in this lot number one was contingent, and not vested. The rule to be applied here is one that is found in very many of the cases. It is a little peculiarly and I think very pointedly expressed by Lord *Westbury* in the case *Edgeworth v. Edgeworth (a)*, where he says:

(a) L. R. 4 H. L., at page 41.

1881. “It is impossible to annex to an estate previously clearly given an additional condition from words which are capable of being rendered historically, that is, which may be interpreted, as a description only of what must occur before the estate given to the person in remainder can arise.” In the same case, Lord *Hatherley*, adhering to what he had stated in the former case, *Maddison v. Chapman* (a), said, that if any superadded limitation not connected with the previous limitation, but clearly a superadded condition, is imposed by the testator, that condition must be fulfilled.

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Now, I think the words employed here by the testator may be fairly and properly said to be a description only of what must have taken place before the estate previously given to *Thomas McKay* in this lot, in remainder, could arise; and I think it cannot be said there is any such superadded condition.

Judgment. The other parts of the will from which it was argued that the interest taken by *Thomas McKay* in this lot was a contingent one, are those following the residuary devise and bequest, the one providing that in the event of any one or more of the children dying without legal issue before coming into possession of his, her or their share or shares of the property or money devised or bequeathed, the share or shares of such child or children should go to and be equally divided among the survivors, and the legal issue of such, if any, as should have died leaving issue; and the other providing for the event of any of the children dying before coming into possession as aforesaid, and leaving legal issue. Now, I think that upon a fair reading of the will, the proper conclusion is, that these passages are confined in their effect to the residuary devise and bequest which immediately precede them, and that they have no effect whatever in respect to the remainder before mentioned, which was given to *Thomas McKay*.

The conclusion, then, at which I have arrived, in

respect of this Lot number one, is, that by the will of the Honorable *Thomas McKay* a vested remainder was given to *Thomas McKay*, his son, and I think it manifest from a fair perusal of the whole will, that this, as well as being the legal meaning, fully accords with the actual intention of the testator. It is not intimated that *Thomas* ever conveyed away his interest in this lot, and he was, in my opinion, at the time of the execution of his will and at his death entitled to this remainder, which passed under his will, and afterwards came into possession upon the death of his mother, for the admitted case shews that she did not marry a second time.

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Then as to lots two, three, four, and five, in the same concession—the land in the city of Ottawa, part of lot letter O in the said city (excepting the part sold *John McKinnon*), and Green Island, near the mouth of the Rideau River—I think it beyond reasonable doubt that the Act of Parliament had the effect of vesting these lands in *John McKay* and *Thomas McKay*, and their heirs, as tenants in common, subject to the estate for life of their mother, with the right of survivorship between them, in case one should die before the other, without legal issue, before the death or marriage of their mother.

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It is admitted that *John* died in the month of October, 1862, before the death of *Thomas*, and long before the death of their mother, without legal issue; and upon this event happening, *Thomas*, in my opinion, became entitled to a vested remainder in fee in these lands. It is not intimated that he ever conveyed away this right, and he was, I think, at the time of the execution of his will and at his death entitled to this remainder, which passed under his will, and afterwards came into possession upon the death of his mother.

As to the residuary gift in this will, there was before me scarcely any discussion, and I am not quite aware

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as to whether there is any difference on the subject, or whether it is a matter now of much importance, but I think it well that I should state what I consider to be its character. The part of the residuary estate that was realty was by the will directed to be converted, and for the purpose of construing the gift the whole should be treated as personalty. It is a rule that when there is no gift except in the direction to pay, or to pay and divide, if upon the whole will it appears that the future gift is merely postponed to let in some other interest, or, as the Courts commonly express it, "for the benefit of an estate," the interest will be vested, although the enjoyment will be postponed, as, for instance, when the gift is postponed to let in a prior life estate, *Blamire v. Geldart (a)*; and it is another rule that if the testator has given over a fund, in case the legatee dies before the time named, under particular circumstances (as without issue), from which it is to be inferred that the legatee is to retain it, in every other case the gift will be vested, liable only to be divested on the particular contingency; and again, if the testator has in other parts of the will treated the fund bequeathed as belonging to the legatee, and spoken of his share therein before the specific period, the natural conclusion is, that the legacy is vested, liable only to be divested on a particular contingency; *Jarman*, p. 806; *Tudor*, p. 842, and the cases there cited. Now in looking at the words of the residuary gift, and I need not repeat them here, I think it quite plain that the interests of the legatees were vested interests, but liable to be divested on the particular contingency mentioned.

Such appears to me to be the proper interpretation of the will of the late Hon. *Thomas McKay* and of the Act of Parliament mentioned in the pleadings, so far as any question has been raised concerning them. The

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(a) 16 Ves. 314, Tudor's L. C. 850.

plaintiff asks also for an interpretation of the will of the late *Thomas McKay* the younger. There was not any contention before me as to the meaning of this will or of any part of it. The chief contention was, as to whether or not certain lands mentioned in the will of the late Hon. *Thomas McKay* passed under the will of *Thomas McKay* the younger, and this I have already disposed of. I am not aware that there is any difference of opinion as to the proper meaning of the will of *Thomas McKay* the younger, and I do not see that there should be any.

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The plaintiff asks for a partition of the real estate, in accordance with the terms of an agreement mentioned in the bill. This is tantamount to asking a specific performance of the agreement. It is entirely plain that this cannot be granted.

Counsel for the plaintiff asked for a partition of the estate. It is plain, I think, that the plaintiff, being a trustee for sale only, is not in a position to demand and have a partition. It is objected to by many of the defendants, and cannot be granted.

Judgment.

Counsel for some of the defendants asked that the land should be sold under a decree of the Court. Counsel for the adult defendants other than the Hon. *Robert McKay* and his wife opposed this, saying that it would be absolute waste to sell the property at present, and the affidavit of the plaintiff indicates the same thing, so that I cannot see my way to ordering a sale.

I do not think there should be any reference to the Master.

I think the plaintiff was justified in coming to the Court for the interpretation that was asked—a declaration of right, (see General Order 538,) for there is consequential relief that he might have asked but did not. See *Murphy v. Murphy* (a), *Macklem v. Cummings* (b).

(a) 20 Grant 575.

(b) 7 Grant 318.

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I think it better to grant only this, leaving each of the parties interested, as well as the plaintiff, to take such proceedings as he or she may be advised for the partition, sale, or other disposition of the estate, or for any account or accounts that may be thought necessary, or for any other purpose, the same as if this suit had not been brought, where evidence can be given and the Court placed in a better position to say what, if anything, should be done.

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I think the plaintiff should, out of the estate in his hands as surviving trustee under the will of *Thomas McKay* the younger, pay the costs of all the defendants, and that he is entitled to his own costs out of the same estate.

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## RUMOHR V. MARX.

*Pleading—Practice—Amended statement of claim—Partial demurrer.*

The defendant having filed his statement of defence, the plaintiff replied thereto by amending his claim, adding to the statement two new paragraphs which would have been demurrable if pleaded as a reply. The matters thereby set up, when separated from the rest of the statement, did not disclose any distinct cause of action. Thereupon the defendant served an amended statement of defence, and demurred to the two paragraphs which had been so added. In view of the fact that the paragraphs which had been so added did not disclose any separate or substantial cause of action, and that the demurrer, however decided, could not advance the cause, the Court (BOYD, C.) overruled the demurrer without costs, as it was the first occasion the point had arisen under the Judicature Act. The propriety of partial demurrers which do not bring up the whole or even a substantial question between the litigants, thus tending to increase costs, considered and remarked upon.

\* This was a suit by *R. Rumohr* against *Frederic Marx*, the statement of claim in which set forth that under and by virtue of an Indenture of Bargain and sale by way of mortgage, dated 16th October, 1880, and made between one *Benjamin J. Henry*, *Martha Henry*, his wife, and the plaintiff, securing the sum of \$1,794 with interest thereon, at the rate of seven per cent. per annum, (to which mortgage for greater certainty the plaintiff on the trial of the said action craved leave to refer), the plaintiff was a mortgagee of certain freehold property therein comprised : that on or about the 4th day of January, 1881, the plaintiff borrowed from the defendant the sum of \$300 on a promissory note ; and on the same date the plaintiff assigned by indenture of assignment (to which for greater certainty the plaintiff craved leave to refer)

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\* As this is the first instance that a question of pleading has come up under the new practice, it has been thought desirable to set the statements out at length, although simply an action to enforce redemption.

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to the defendant the said mortgage and lands therein described as collateral security for the payment of the said promissory note of \$300; that the said indenture of assignment contained a proviso that on the due payment of the said promissory note of \$300, the said mortgage should be re-assigned by the defendant to the plaintiff, his executors, administrators, or assigns; that on or about the 23rd day of March, 1881, the plaintiff again borrowed from the defendant the sum of \$250 on a promissory note, and on the same date the plaintiff again assigned by indenture of assignment (to which for greater certainty the plaintiff craved leave to refer) the said mortgage and lands therein described to the defendant as collateral security for the payment of the said promissory note of \$250: that the said last mentioned indenture of assignment also contained a proviso that on the due payment of the said promissory note of \$250, the said defendant should re-assign the said mortgage to the plaintiff, his executors, administrators, or assigns; that the defendant accepted from the plaintiff the said assignments and mortgage, subject to the provisos and conditions therein contained, as collateral security for the promissory notes respectively, and with the said assignments and mortgage, the defendant received and took, and kept, as muniments and evidence of title to the said lands and mortgage, certain title deeds relating to the said lands, including a bond or deed made between the plaintiff and said *Henry*, and dated on or about the 7th day of September, 1880, and a deed of bargain and sale from plaintiff to *Henry*, dated on or about the 16th day of October, 1880, and held the same subject to be delivered back to the plaintiff on payment of the said notes; that the plaintiff had offered to pay the defendant all moneys secured by the said assignments of mortgage and promissory notes, since said moneys became payable, and had requested him to re-assign the said mortgage or deliver back to the plaintiff the said

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deeds: that the plaintiff claimed a re-assignment of the said mortgage, he being ready and willing, and offering to pay all moneys secured by said assignments of mortgage and promissory notes; and the plaintiff claimed such other and further relief as the nature of the case might require.

The defendant by his statement of defence admitted that the mortgage in the plaintiff's statement of claim mentioned, was assigned to him by instruments bearing date on or about the times mentioned in the plaintiff's statement, but asserted that the same was assigned to secure the moneys, interest, and costs, due or to become due to the said defendant: that the plaintiff at the time and after the making of said assignments to the defendant, was indebted with others to one *Samuel Barfoot* in a sum of over \$300, and that the said *Barfoot* had recovered a judgment in the County Court of the county of Kent, on the 13th day of February, 1880, against the plaintiff and others for the sum of \$314.93 for debt, and \$19.86 for costs, and for the having of execution of the said judgment the said *Samuel Barfoot* on the 12th day of August, 1881, and before the plaintiff made any demand on the defendant to re-assign the said mortgage, and while the defendant was holding the said mortgage, placed in the hands of the sheriff of the county of Kent, being the county wherein the lands in said mortgage mentioned were situate, and where the said mortgage then was and the plaintiff resided, writs of *feri facias* against the goods and chattels of the said plaintiff indorsed to levy for the above mentioned sums, together with interest thereon, the costs of the same and other writs and other lawful expenses, and amounting in the whole to the sum of about \$400; and that the same was and continued to form a charge, lien, and incumbrance on the said mortgage and the plaintiff's interest therein, and the full amount thereof was due and payable by the plaintiff: that the said sheriff afterwards, and on the

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day of the said writs coming to his hands under the authority of the said writs, seized all the interest of the plaintiff in the said mortgage, and afterwards took the same from the defendant subject to the claims of the defendant under the said assignments; and that the said sheriff then had and held the same under the said writs; that afterwards, and on or about the 27th of September, 1881, the defendant obtained an assignment of said judgment from the said *Barfoot*, and then held the same, and was entitled to be paid the full amount thereof; that all the said transactions took place before the plaintiff asked for a re-assignment of said mortgage, and while the plaintiff made no legal or proper demand or tender on or to the defendant to entitle him thereto, the defendant offered to re-assign the said mortgage on the said judgment being paid to the sheriff; and on the amount secured by said assignments being paid to him, and that the defendant had always been ready and willing to do so, and thereby offered to do so then.

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The plaintiff thereupon amended his statement of claim by inserting amongst others, the following paragraphs:

“The defendant pretends and claims to have purchased from one *Barfoot* a certain judgment in the County Court of the county of Kent against the plaintiff, and held and claimed to be entitled to hold the said mortgage, assignments, and deeds until the said judgment and a pretended execution issued in pursuance thereof were paid by the plaintiff to the sheriff of the county of Kent, and refused to re-assign the said mortgage, or to deliver back to the plaintiff the said assignments, mortgage, and deeds until the said judgment was paid to the plaintiff, and claims to have a right so to do; and while the defendant so claimed, and without any seizure of the said assignments, mortgage, and deeds, or any interest therein having been previously made by the said sheriff, and

while the said pretended execution, even if it were valid and subsisting, formed no charge, lien, or incumbrance upon said mortgage, assignments, and deeds, or any of them, or any interest therein, the said defendant voluntarily and of his own motion gave and delivered the said assignments, mortgage, and deeds to the said sheriff, and requested him to seize and hold the same under said pretended execution, and the said sheriff now holds the same under instructions, and in consequence of such delivery and request by the defendant as aforesaid, and not otherwise. The plaintiff submits that under the circumstances he should not be compelled to pay the said pretended judgment and execution to the said sheriff, even if the same were valid and subsisting. But the plaintiff further charges, and the fact is, that the said alleged judgment was obtained against one *John L. Knapp* and the plaintiff as one of the sureties for the said *Knapp* for a debt of the said *Knapp*, and the said *Knapp* was possessed of a large amount of land, sufficient to pay the said judgment and execution issued thereon, and all prior claims against the said estate, as both the plaintiff and the defendant well knew; and the said land was offered for sale by public auction by said sheriff under various executions (including the said execution of *Barfoot*), forming a lien and charge thereon, and *Barfoot*, who held the said judgment and execution, attended the said auction sale for the purpose of bidding the said lands up to a sufficient price or sum to cover and pay the said judgment and execution, and all prior claims thereon, and was about to so bid when the defendant requested the said *Barfoot* to desist from bidding, and allow said defendant to buy said land, and in consideration therefor, and in pursuance of the understanding then come to between defendant and *Barfoot*, said defendant agreed to pay sufficient to cover said judgment and execution, and

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1881. said *Barfoot* refrained from bidding, and said defendant bought and became the purchaser of said lands, and paid the amount of said judgment to *Barfoot*, and the amount of all prior claims thereon to the said sheriff; and the plaintiff submits that by reason thereof the said judgment and execution should be deemed paid and satisfied, and prays that the Court may, if necessary, so decree."

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Statement.

Whereupon the defendant filed an amended statement of defence denying the statements and allegations in the amended claim, and further alleging that while he admitted purchasing part of the lands of *John L. Knapp* from the Sheriff of the county of Kent, he did so under executions prior to the execution issued under the said judgment in favour of *Barfoot*, and the amount paid by the defendant to the said sheriff was insufficient to pay, and did not pay or satisfy any part of the said execution, and that the defendant never agreed to pay any further sum for the said lands; and the purchase of the said judgment from *Barfoot*, and the payment made to him was made by the defendant merely for the said assignment thereof by him to the defendant, and not as stated by the plaintiff in the said amended statement of claim; and that such payment in no way released, satisfied, or discharged the said debt judgment and execution as against the plaintiff, or affected his rights, and that there was no agreement made nor act done whereby the plaintiff was released from payment of said execution.

The defendant also demurred to the amendments so made in the plaintiff's statement, and being the 8th and subsequent paragraphs of the plaintiff's amended statement of claim on the ground that the same disclosed no legal or sufficient answer to the defendant's defence originally filed, and disclosed no legal or other grounds of action to which effect could be given by the Court as against the defendant, and insisted that the said

mortgage was bound by the writ from the date of its delivery to the sheriff, and that the mode of seizure, or whether made at the instance of the defendant, was wholly immaterial; that the plaintiff did not deny the fact of the judgment and execution as set out in the defendant's defence, and shewed no grounds for avoiding payment or exempting the said mortgage from seizure thereunder: that the statement was not any answer to or ground of action against the defendant; and as to the alleged agreement, that the same did not disclose such facts or circumstances as could be construed into an agreement or contract, nor such an agreement as could be enforced in this Court; that the plaintiff was not privy to it, and could not claim any benefit under it, or take any proceedings to enforce it; that it was not alleged to be in writing, which would be requisite under the Statute of Frauds as relating to an interest in lands; that there was no consideration for it, that it did not allege any completion of it, nor that any money was bid or paid in pursuance thereof, and under any circumstances that the alleged agreement would not release the plaintiff from paying the said judgment and execution; and that the alleged agreement was illegal.

The demurrer came on to be argued before *Boyd, C.*, on the            day of            1882.

Mr. *W. Douglas* in support of the demurrer.

Mr. *Moss, Q. C.*, contra.

BOYD, C.—The course of pleading in this case is material. The plaintiff's claim originally was, that being the holder of a mortgage on land he assigned it to the defendant as security for the payment of two notes, and when they fell due he offered to pay, and requested a re-transfer of the mortgage, but the defendant refused, and therefore the plaintiff sought redemption. The

1881.

Rumohr  
v.  
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Jan. 19th.

Judgment.

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v.  
Marx.

defence to this was admitting the right to redeem as claimed, but setting up that one *Barfoot* had judgment and execution against the plaintiff, under which the sheriff had seized the mortgage in question, and that after seizure the defendant had obtained an assignment of the *Barfoot* judgment, whereby the defendant claimed that the execution should be paid, as well as the notes, before the plaintiff could get a re-assignment of the mortgage. Thereupon two courses were open to the plaintiff: he could either reply to this defence, or he could amend his statement of claim by setting up and invalidating, by way of anticipation, the line of defence adopted. He chose the latter alternative, and amended his claim by the addition of the two paragraphs demurred to, which are as follows:—[The Chancellor here read the paragraphs above set out in the amended statement of claim.]

Judgment.

To this amended claim the defendant filed an amended statement of defence, in which he denies the agreement with *Barfoot* at the sale; avers that he purchased the *Barfoot* judgment; and also demurred to the amended paragraphs above set forth.

The right to demur partially is now regulated by Rule 189. There may be a demurrer to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein do not shew any cause of action or ground of defence to a claim or any part thereof, or set-off, or counter-claim, or reply, to which effect can be given by the Court as against the party demurring.

If the matters contained in the amendment had been pleaded by way of reply to the original defence, no doubt both or either of the paragraphs might have been properly demurred to, but being put in the statement of claim it must be considered whether they constitute any part of a pleading setting up a distinct cause of action. As a question of pleading, the record is to be treated

as if the amended claim was the original statement of claim. So regarded, can it be argued that these amendments, severed from the rest of the statement, disclose any distinct cause of action? Manifestly not. Technically these matters are not pleaded as a reply, and it is not unreasonable to read the language of the rule strictly so as to repress demurrers like the present, which, however disposed of, will not advance the cause one jot. This is just such a partial demurrer as was deprecated in *Leyman v. Latimer (a)*. The whole action will have to be litigated on the facts at the hearing, so that this sort of demurrer aptly illustrates what is said by one of the text writers: "The propriety of partial demurrers is more than doubtful as they only tend to a useless expenditure of costs, a demurrer being useful only when it raises the whole question between the parties." *Peel's Prac.* 2nd ed. p. 67.

An example may be found in *Powell v. Jenkins (b)*, of a successful partial demurrer to an amended statement of claim, where the portion demurred to was severable, and represented a substantial cause of action as to two things in respect of which separate relief was claimed, and upon separate allegations. If the two matters in the amendment were pleaded by way of reply, it might be found that one at all events was insufficient, but the only course open at present is, for the reasons already given, to over-rule the demurrer. I give no costs, as this is the first time the question has arisen under the Act.

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Rumohr  
v.  
Marx.

Judgment.

(a) L. R. 3 Ex. D. 357.

(b) L. R. 9 Ch. D. 44.

1881.

## RE KERR, AKERS &amp; BULL, SOLICITORS.

*Solicitor and client—Costs, right to recover—Onus of proof—Conflicting statements.*

*C.*, who was in active practice as a lawyer, and the author of several useful legal treatises, had obtained a mortgage on a valuable leasehold estate, and having taken such proceedings as resulted in a forfeiture of the mortgagors' term, procured from the owner of the property a renewal of the lease to himself. The mortgagors instituted proceedings to redeem, but *C.*, asserting that he was absolute owner of the interest, instructed solicitors to defend the suit. They expressed to *C.* some doubt as to his right to resist the claim of the mortgagors, whereupon he, with one of the solicitors, went to a counsel of note, who, without having time to give the case full consideration, verbally, advised them that the suit should be defended. *C.* drafted his answer, his solicitor adding one clause. Counsel retained for the hearing told *C.* he would undoubtedly fail in the litigation, and subsequently the usual decree for redemption was pronounced, *C.* being ordered to pay such costs as had been occasioned by his resisting redemption. It was alleged against the solicitors that they had advised *C.* that he would be entitled to costs in any event; that they had refused to consider or submit to him an offer to pay the mortgage money and costs, on the ground as they alleged that *C.* claimed about three times the sum offered; that they had colluded with the mortgagors' solicitor in having proceedings instituted, which they had wrongly advised him to defend; and that he had a good defence, but the same had been negligently managed. There was a written retainer, which did not express any special arrangement as to costs or the terms on which the defence was to be conducted. The Court being of opinion that *C.* had failed to make good his charges against the solicitors, affirmed the order made by SPRAGGE, C., reversing the finding of the Taxing Officer that the solicitors were not entitled to recover the costs of the litigation.

Although in a simple case of a distinct assertion and a distinct denial of a fact at the time of a client retaining a solicitor, which thus forms a part of the contract, it may be a proper rule to say that in such a case the solicitor has himself to blame when any difficulty arises, as he might have protected himself by having his retainer in writing, there is not any authority for extending that rule to facts arising after the retainer and during the progress of the litigation. In any event the rule applies only where it is simply oath against oath, not where there is other evidence direct or circumstantial in support of the solicitor's.



In this matter an application had been made by Messrs. *Kerr, Akers & Bull* under the statute for the taxation of the costs against Mr. *Samuel Clarke*, incurred in the defence by them for *Clarke* of a suit instituted to compel *Clarke* to re-convey to the plaintiffs a leasehold interest of a certain property, known as "The Victoria Park," in the neighbourhood of Toronto, upon payment of the moneys advanced by him, together with interest and costs.

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 Re *Kerr,  
 Akers &  
 Bull.*

On proceeding with such taxation the Master held that, under the circumstances appearing before him, and which are clearly set forth in the judgment, the solicitors were not entitled to claim any portion of such costs, and disallowed their bill.

From this ruling of the Master the solicitors appealed, and the appeal came on to be argued before Spragge, C., who reversed the finding of the Master; and thereupon Mr. *Clarke* set the matter down for re-hearing before the full Court.

Mr. *McMichael*, Q.C., and Mr. *McCarthy*, Q.C., for *Clarke*.

Mr. *S. H. Blake*, Q.C., and Mr. *George Kerr* contra.

PROUDFOOT, J.\*—This is the re-hearing of an order made by the late Chancellor allowing an appeal from the certificate of the Master who had certified that the solicitors were not entitled to costs.

Jan. 16th.

Mr. *Clarke*, who employed the solicitors, was himself a solicitor and a barrister.

He was mortgagee of a leasehold interest, and I think it sufficiently plain that he had formed a plan to procure the lease to be forfeited by the lessor for non-payment of rent, for the purpose of procuring a lease

Judgment.

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\* *Boyd*, C., took no part in the matter, having been concerned in it while at the bar.

1881. to himself, intending to hold it as an absolute irredeemable interest. The forfeiture was accomplished, and a new lease made to *Clarke*.

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Akers &  
Bull.

Judgment.

The mortgagor then took proceedings to redeem the mortgage. *Clarke* employed the solicitors to negotiate on his behalf with the mortgagors, he claiming to be the absolute owner. The mortgagors offered the amount of the mortgage, and sums disbursed on account of the property by *Clarke*, and interest and costs. *Clarke* refused to take this sum. He alleges that his solicitors colluded with the mortgagors' solicitors to have a bill filed and a defence put in, and thus obtain the costs of a Chancery suit. He says this was done during his absence in New York. It is not improbable that the solicitors finding it impossible to settle with the mortgagors on the basis laid down by *Clarke*, may have said that a bill would have to be filed. But I do not think that is established. If it were, it would be very far from establishing a charge of so serious a breach of professional duty as the client makes against them. It is positively denied by the solicitors, and it seems to me to be absolutely without foundation.

On his return from New York, *Clarke* was apparently not very confident in the value of the advice to be got from his solicitors, and desired to get the advice of some other counsel. This was before the answer was put in. In company with Mr. *Kerr* he consults Mr. *Leith*, a counsel, an author of eminence on questions of real property, not only on such as arise in Courts of law, but also in equity. The facts are stated to Mr. *Leith*, and Mr. *Kerr* says, and it is not denied, that he acquainted Mr. *Leith* with his own doubts as to his client's right to resist redemption. Mr. *Leith* was about to leave the country and could not give the time fully to consider the case and give a deliberate opinion upon it, but he expressed his opinion to be that it was not clear that Mr. *Clarke* might not maintain his contention that he was an absolute owner, and advised the

suit to be defended. Acting upon this advice, Mr. *Clarke* himself drew the answer setting out the facts on which he claimed to be irredeemable, and this, with an addition of one paragraph added by Mr. *Kerr*, was that filed in the suit. It was said that this one added paragraph contained the epitome of the whole matter; probably it did, as the design of the client was to insist upon the absolute right, and this paragraph asserted distinctly this right as the result of the previous paragraphs prepared by the client himself.

Mr. *Clarke* then makes a charge of improper conduct in his solicitors in assisting to *rush* the case through with unnecessary haste. I think this is disproved, and that an application for a speedy hearing of the case was opposed by the solicitors, and the hearing was ordered by the Chancellor, because he thought it a proper case for it, considering that a leasehold interest was in question which was every day running out, and becoming less and less valuable. Besides, there is no evidence, and so far as I can see no pretence that the speedy hearing was injurious to the client.

On the day before the hearing Mr. *Clarke* with Mr. *Kerr* went to obtain the services of Mr. *Bethune* as counsel, to attend on the hearing. When the case was presented to Mr. *Bethune*, he said at once that there must be a decree for redemption. And it is said that Mr. *Kerr* remarked, "I always thought so." This is probably what actually took place, for we have seen that he entertained doubts on the point, but was overruled by Mr. *Leith*. Mr. *Clarke* does not deny that Mr. *Kerr* expressed his doubts to Mr. *Leith*, and Mr. *Kerr* swears he did, and all that took place was in presence of *Clarke*.

The result of the hearing was a decree for redemption, giving to *Clarke* the costs of an ordinary redemption suit, and making him pay the costs of the attempt to make himself out the absolute owner.

*Clarke* says that he did not know the rule of the

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Akers &  
Bull

Judgment.

1881. Court, that a mortgagee denying the right of redemption must pay the costs of that issue if he fail. And he alleges that he was assured by Mr. *Kerr* that, whatever the event, he would be entitled to his costs.

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Akers &  
Bull.

Judgment.

A good deal was said also about advice, said to have been given by the solicitor, that a sum tendered by the mortgagors was not sufficient, as the mortgagee was entitled to six months' interest in advance. But on his examination *Clarke* admitted he would not have taken the amount tendered, unless compelled to do so. And the nature of the property and the amount of the advance by *Clarke* must be taken into consideration in determining how far he was influenced by any such advice, assuming it to have been given. *Clarke* had advanced \$1,000 on the mortgage of the lease,—he afterwards procured that to be forfeited, and had a lease made to himself, and the property was a park in the neighborhood of Toronto, and was a desirable investment, or thought to be so, and a company was got up for the purchase of it, so that it was thought to be worth in a short time \$9,000. Before he went to New York *Clarke* wanted \$3 000 for his interest, before he returned he wanted \$4,000. The conclusion I derive from this is, that he would not have accepted anything like the sum tendered, and that his course in this matter was not affected by the advice of the solicitors, assuming it to have been given.

The argument before us was, that the defence was so untenable, that a solicitor who did not advise his client to that effect was guilty of such negligence as to disentitle him to costs: that he was asked by the client on the subject, and assured him that in any event he would be entitled to his costs.

This is entirely different from the case made before the Master. There he was contending that he had a good defence, but that it had been so negligently managed he failed in his defence. Now he says he had no defence and should have been told so. This is of great

importance in considering the charge against the solicitors, as it shews that up to the last he was insisting upon an absolute interest, a question he had got Mr. *Leith's* opinion upon, when his own solicitors had doubts about it, and after he had had Mr. *Bethune's* opinion, and after the decree of the Court, and when he was asserting he had been advised to carry the case to the Court of Appeal; I think it very unlikely, that with such a conviction in his mind he would have been influenced by any advice of his solicitors, especially since he seems to have had very little confidence in their advice. I cannot also avoid referring to Mr. *Clarke's* own position. He is a solicitor, and a barrister, and the author of some valuable books on different branches of the law. It is asserted by the solicitor that Mr. *Clarke* told him he had studied all the law on the subject, and had come to the conclusion he had an absolute interest. It is also sworn to by Mr. *Kerr* and Mr. *Akers*, that when they ventured to question this, he got hot and excited, and would not listen to them, so convinced was he of the accuracy of his own view. Mr. *Clarke* had an opportunity of denying all this, but he has not chosen to do so, and I must assume that he could not deny it.

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Akers &  
Bull.

Judgment.

Mr. *Clarke* does not, I think, assert anywhere in his evidence that he directly asked the solicitors if he would be entitled to costs if he failed to hold the property. He says he understood from them he would be so entitled. The solicitors distinctly deny that they ever gave any such advice. And though in a simple case of a distinct assertion and a distinct denial of a fact at the time of retainer, and forming a part of the contract of service, it may be a very proper rule to say, that in such a case the solicitor has himself to blame, as he might have protected himself by having his retainer in writing, yet I am not aware of any authority for extending that rule to facts arising after the retainer and during the progress of the litigation.

1881. At all events the rule only applies where it is simply oath against oath. But where there is other evidence, direct or circumstantial, in support of the solicitor's, I know of no rule that prevents the Court from acting on the testimony so supported. The circumstances I have stated above render it unlikely that any such question was asked, and when the client found his own opinion fortified by Mr. *Leith's*, and when the amount at stake was so considerable, it is not likely that he would have hesitated to risk the suit, even at the hazard of paying costs. Very likely he was told he would be entitled to the costs of a redemption suit, and it is not difficult to see how that, in the light of subsequent events, might easily be magnified by the client into an assurance that he would have them at all hazards. It might also have been said by the solicitor that if the defence were sustained he would be entitled to his costs, which might easily be extended by the client to mean that he would be entitled, even though he did not succeed entirely. Here also it is not the solicitor who is desirous of benefiting by something not stated in writing when the retainer was given, but it is the client who desires to add to it by some verbal statement. When a solicitor takes a retainer in writing he does not insert in it a statement that he is to be entitled to his costs. It is assumed that he is to get the usual reward for his services. If he does not take a written retainer, then when a difficulty arises on that point, and the client swears it was on special terms, it is not an improper course to say to the solicitor he ought to have had his authority in writing. Here I understand the instructions to the solicitor are in writing and disclose no special arrangement as to costs or the terms on which the defence was to be gone into. Mr. *Clarke*, indeed, says he would have settled the matter without litigation had he known he would have to pay costs if he failed. The circumstances before stated lead me to think he is stating his con-

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Judgment.

viction now, not what was in his mind when he drew the answer. I do not desire to say that he is stating wilfully and knowingly an untruth, but that the matters have got so confused in his mind, as to order of sequence of events, that he thinks what his conviction is now was his conviction at an earlier period.

I have arrived at the conclusion therefore that the attorney gave no such assurance as the client now asserts.

It remains to consider whether the attorneys were guilty of that gross ignorance, or of such negligence, as to disentitle them to their costs. The position of an attorney is one that imposes on him duties of a delicate and often of a difficult character. The client has a right to the exercise on his part of care and diligence in the execution of the business intrusted to him, and to a fair average amount of professional skill and knowledge, (*Addison* on Torts, 386, 3rd ed.) and if he does not possess these qualifications, or does not exercise them, the law makes him responsible for the loss to his clients from these deficiencies. In this instance I think there was no assurance in regard to costs in case of failure to substantiate the defence, nor do I think there was any conduct of the attorney in regard to the amount tendered, that should deprive him of costs. And the facts detailed above shew that his opinion was not asked, or, at all events, not relied on by the client as to the validity of the defence, or as to the conduct of the case in Court, for he obtained the opinion of Mr. *Leith* as to the one, and the services of Mr. *Bethune* as to the other. Nor can there be any question of negligence in the statement of facts submitted to counsel, for the client was present, not an ignorant man unable to know what was material to his case, but who knew them better than the attorney himself. If an attorney consults counsel and acts on their advice, he is relieved from responsibility (*Addison* on Torts, 388). A *fortiori*, when the client himself consults

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Akers &  
Bull.

Judgment.

1881. counsel, must the attorney be exonerated from responsibility.

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Akers &  
Bull.

Something was said as to negligence in not having something inserted in the decree that ought to have been there, but I failed to comprehend in what respect the client had been injured, if such were the case. But if there was any omission, it was only in matters that naturally resulted from the decree pronounced, and which should have been attended to by the solicitor who attended to the settling of the decree. But the present solicitors were discharged the day after the hearing of the cause, and before the settling of the decree, and they cannot be affected by anything that was then omitted.

Judgment.

I think all the cases cited decided before 1870, in the English Courts, are to be found in Mr. *Addison's* book. I have referred to those particularly commented on by counsel, and I have looked at some of the others. Some of these have nothing to do with the matter now in question, such as *Hope v. Caldwell (a)*, and *Robertson v. Caldwell (b)*, and granting Mr. *McMichael's* position that, when the attorney's *prima facie* right is impugned in evidence, the *onus* is on him to prove his right to recover, I think he has done so.

Mr. *McCarthy* placed the question of *onus* in rather a different light from Mr. *McMichael*, that the defence was so clearly untenable the attorney must prove he told the client he would have to pay the costs. I do not think there was any such duty in the case. Can it be said that an attorney was bound to disbelieve the counsel whom the client consulted? The highest the case can be put on behalf of the client is, that the matter was doubtful, and in that case there was no such duty. The client knew, when he consulted Mr. *Leith*, that the attorney had doubts on the subject. This is sworn to by the attorney, and not denied by

(a) 21 C. P. 241.

(b) 31 U. C. R. 402.



the client. But the client decided to act on Mr. *Leith's* opinion. 1881.

Re Kerr,  
Akers &  
Bull.

In the suit, and in the mode of conducting it, there was nothing out of the usual course, for I think it completely disproved that the attorneys aided in rushing the case, or in consenting to a speedy hearing; but even had they done so, unless the client were damaged, he could not make them liable for anything, and I fail to see how a speedy hearing would have hurt him.

I think the order of the Chancellor was right, and should be affirmed, and the appeal dismissed, with costs.

FERGUSON, J.—This is the re-hearing of an order made by the present Chief Justice of Ontario, then the Chancellor, allowing an appeal from a certificate of the Master, whereby he certified that these solicitors were not entitled, as against their client, Mr. *Clarke*, to their costs of the defence in the suit, *Shields v. Clarke*, apparently on the ground of negligence.

The Master, after finding in favour of the solicitors on the charge made by the client, that they had procured the bill in that suit to be filed against him, and that they had entered into an arrangement with the solicitors for the plaintiffs therein prejudicial to Mr. *Clarke*, says that there is a conflict of evidence on the question as to whether or not they fully and properly advised him, saying that it was alleged by Mr. *Clarke* that he was never informed that his denying the right of the plaintiffs in that suit, to redeem a mortgage held by him upon certain leasehold property of the plaintiffs, might deprive him of his costs of suit: that he was throughout advised that he had a good defence to the suit, and must succeed; that he relied entirely on the advice of the solicitors, and that he would not have defended the suit had he been advised that the plaintiffs had a right to redeem him—while on the other hand the solicitors allege that Mr. *Clarke* was from the first fully advised by them that

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1881. the plaintiffs had, in their opinion, a right to redeem; that the difficulties in the way of any other conclusion were discussed with him, and pointed out to him, but that he insisted upon claiming as absolute owner of the property.

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Akers &  
Bull.

The Master says the solicitors admit that they did not advise him that the effect of denying the right to redeem might deprive him of his costs of the suit, and that they did not go into figures to ascertain whether a tender that the plaintiffs had made was or was not sufficient; and he says that where there is such a conflict, the statement of the client must prevail against that of the solicitor, adding, that the solicitor always has it in his power to put his advice in writing, and, having done so, if the client insists on proceeding, the solicitor is free from responsibility.

Judgment.

Now, the facts, or at least the leading features of the case, are these: Mr. *Clarke* had a mortgage on the property of the plaintiffs in that suit for \$1,000. He had also advanced, one way or another, sums sufficient to make his claim somewhere about \$1,500 or \$1,600. The property was a lease of a park, not far from the city, and it is, I think, quite manifest that he conceived the idea that he could become the owner of the property instead of the mortgagee of it, or that he could, by getting a lease of it from the lessor, place himself in such a position as to be able to obtain from these plaintiffs a large sum of money over and above the amount of his claim, they being in somewhat embarrassed circumstances, having executions against them in the hands of the sheriff, and, there being apparent grounds for a forfeiture of their lease. Mr. *Clarke* did procure a lease from the lessor, he apparently thinking that it was only to serve the purpose of preserving his, Mr. *Clarke's* security, notwithstanding the forfeiture of the plaintiffs' lease; but having got the lease, Mr. *Clarke* manifestly intended and endeavoured to make use of it in the way above

indicated. He had occasion to go to New York, and before going he retained these solicitors to effect a settlement for him with the plaintiffs. While he was in New York he wanted \$3,000 for his claim, and he afterwards wanted \$4,000. The property, it was thought, was worth \$8,000 or \$9,000. The plaintiffs were not willing to pay Mr. *Clarke* any more than the actual amount of his claim as mortgagee, and a settlement under such circumstances seemed out of the case. Before Mr. *Clarke* returned from New York, the plaintiffs had filed their bill to redeem, and these solicitors had accepted service of it. He now charges them with improperly procuring this bill to be filed, but the Master found against him on that point. On his return from New York he might have repudiated what the solicitors had done, their retainer being limited as above; he did not do so, but, on the contrary, he ratified it. The solicitors say that they had very grave doubts about the defence being a tenable one, and that they so told Mr. *Clarke*, and it is beyond all doubt that, shortly after his return from New York, and before the bill was answered, Mr. *Clarke* and Mr. *Kerr* went together to consult counsel, Mr. *Leith*, a lawyer of eminence, as to the defence. They did consult him, and, it is beyond dispute that Mr. *Kerr* did, in Mr. *Clarke's* presence, state to Mr. *Leith* his fears and doubts as to whether or not the defence was one that was tenable, and Mr. *Leith*, though not having much time at his command, being preparing to leave the city, did advise that the suit was one that ought, under the circumstances, to be defended. Mr. *Clarke* knew Mr. *Leith* well, as he knows all the leading lawyers of the city, and having gotten this advice, he himself, drafted the answer to the bill in the suit. In the face of this, Mr. *Clarke* contended before the Master as he now contends, that he was throughout advised by the solicitors that he had a good defence and must succeed, and that he

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Akers &  
Bull.

Judgment.

1881. relied upon such advice. It is stated, both by Mr. *Kerr* and Mr. *Akers*, that whenever they spoke to Mr. *Clarke* about the danger that might arise in respect of the forfeiture of the plaintiffs' lease, he became impatient, (one of them, Mr. *Akers*, said he would go into "tantrums,") and would not listen to them, asserting that the forfeiture of the plaintiffs' lease was complete, and this is not denied, or at least not directly denied, by Mr. *Clarke*, and I think it is impossible to arrive at any conclusion on the evidence, but that Mr. *Clarke* is in error when he says he was throughout advised by the solicitors that his defence was good, and that he relied on their advice. His reliance was, I think, upon his own preconceived notions, fortified by the advice from Mr. *Leith*, to the effect that the suit should be defended; and having had this advice of counsel given in the presence of *Clarke*, who is himself a lawyer, and who, according to some of the evidence, at least, said he had read and studied up the law relating to the case were the solicitors, as solicitors, to set up their own views as against the advice of counsel so obtained? Certainly not. The charge that the solicitors facilitated the plaintiffs' solicitors in their conduct of the cause is not supported by the evidence, and there does not appear to have been anything out of the ordinary course in the conduct of the defence until the approach of the hearing of the cause, when Mr. *Clarke* again retained counsel, who, when he had examined his brief, was of the opinion that the defence must fail. The case was heard, and, I think the complaint made against the solicitors, as solicitors, respecting what occurred at the hearing, whether they have any foundation or not, are matters in regard to which the solicitors were relieved of responsibility, and very soon after the hearing of the cause Mr. *Clarke* changed his solicitors, no proceedings having been had in the meantime in respect of which any complaint is made. Notwith-

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*Akers* &  
*Bull*.

Judgment.

standing the advice given by Mr. *Leith*, the solicitors say that they did advise Mr. *Clarke* to settle the suit, and he does not directly deny this when asked the question, and, it seems to be undisputed that they advised him to submit the matters in dispute to arbitration.

1881.

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Akers &  
Bull.

As to the answer not having been submitted to equity counsel to be settled, there does not seem to have been any injury sustained by adopting the course that was pursued. As to Mr. *Clarke's* not having been told that setting up the defence he did he ran the risk of having to pay costs, I think it more than probable that the question was not discussed at all. Mr. *Clarke* was defending the suit for the purpose of realizing a large sum above the amount of his mortgage, the difference between \$1,500 or \$1,600, and \$4,000, and from all the evidence I consider it plain that he would not have changed his course had he been told this. Then, it is urged that the solicitors did not make any calculation as to the amount of the tender that was made by the plaintiffs in the suit. Even if it was the duty of the solicitors to make this computation under the circumstances (and I do not say that it was), can it be said that any one employing his common sense, looking at this case and taking into account the motives of Mr. *Clarke* at the time, and the large amount that he was claiming, and endeavouring to make the plaintiffs pay, would arrive at the conclusion that a difference of a few shillings or a few dollars in the amount of this tender would have changed the course of his conduct, even if it be granted that any difference would have appeared on investigation? I think not. I do not think that this is a case in which the statement of the client and that of the solicitor have to be weighed in the manner indicated by the Master, even if the conclusion should be as he says, (and for such a conclusion no authority was cited except in the case of a dispute on the question of retainer.) I think Mr. *Clarke* had a

Judgment.

1881. scheme and a design of his own to carry out, and he relied strongly, as I have said, upon his own convictions, supported by the advice received from Mr. *Leith*; that he did not rely upon the opinions or advice of his solicitors; and I fail to see that he has sustained any charge against these solicitors sufficient to deprive them of their costs against him. I do not think the case one requiring to be considered upon nice questions of law as to the degree of negligence that will deprive the solicitor of his remuneration. I think the case, on the evidence, plainly against Mr. *Clarke*, and I am of the opinion that the order of the Chancellor was right, and ought to be affirmed.

Re Kerr,  
Akers &  
Bull.

Judgment.

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## HAMILTON PROVIDENT AND LOAN SOCIETY V. BELL.

*Principal and agent—Valuer of land, liability of for loss.*

The paid agent of a Loaning Society, who professed to be skilled, and had a knowledge in the valuing of lands, was held liable to the Society for a loss sustained by them by reason of a false report of such agent.

*Silverthorne v. Hunter*, 5 App. R. 157, distinguished.

This was a suit by *The Hamilton Provident and Loan Society* against *Samuel Bell*, the bill in which was taken *pro confesso* against the defendant, and stated in effect:

(1.) That the plaintiffs were an incorporated company duly authorized by law to lend moneys and to accept mortgages upon real estate in security for the repayment thereof; (2) that some time during the month of July, 1878, one *Gregory Bobier*, of the township of Tarbolton, in the county of Carleton, merchant, then being the owner in fee simple of certain lands in the said township containing 200 acres, made an application to the plaintiffs through the defendant for a loan of \$1,500, offering in security therefor to give to the plaintiffs a mortgage upon these lands. (3) That the defendant who assumed to have a thorough knowledge of the value of real estate situate in the said township and adjacent to the above mentioned land, had, at his own request, been employed by the plaintiffs to make valuations of the lands of persons applying for loans of money, and to report and certify thereon to the plaintiffs; (4) that on or about the 30th of the said month of July, the defendant, at the request of the plaintiffs, personally inspected the said lands, and after having been informed by the plaintiffs that they would place implicit reliance on the truthfulness of his representations and the correctness of his valuation reported thereon in writing under his hand to the plaintiffs, representing that a large portion of said parcel of land,

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to wit: 80 acres was cleared and under cultivation, and that no portion thereof was swampy or lying waste, whereas in truth and in fact only two acres were under cultivation, and more than 100 acres were covered with swamp. And the defendant also in manner aforesaid, represented to the plaintiffs that said lot of land was worth and would sell for the price or sum of \$3,440, and recommended the plaintiffs to invest the sum of \$1,500 upon the security aforesaid, whereas the same was not worth more than \$1,000; (5) that the plaintiffs relying upon the veracity of the defendant, and wholly depending upon his representations and valuation, advanced to the said *Bobier* the sum of \$1,500, and received from him as a security for the repayment thereof a mortgage upon the said parcel of land; (6) that the defendant was duly paid by the plaintiffs for making the valuation and report aforesaid, and for his services in connection therewith; (7) that the said *Bobier* made default in payment of the

Statement. said mortgage moneys, and became insolvent and wholly unable to pay anything in respect thereof; (8) that the plaintiffs were not able to obtain a purchaser for the said lands at a greater price than \$1,000; (9) that the plaintiffs had offered and were ready and willing to convey said lands upon being paid the amount of their claim in respect thereof, but the defendant refused to accept such offer; (10) and the plaintiffs charged that the defendant either designedly and with a fraudulent intent made such incorrect and untruthful representations and valuation, or was guilty of such gross neglect in respect thereof, unaccompanied by a belief that his representations were true, as to render him liable to the plaintiffs to make good to them the loss and damages by them sustained on account thereof, and the plaintiffs submitted that he should be ordered to pay the same, and that in default of payment thereof, writs of *feri facias* goods and lands should be issued against him.



The prayer of the bill was : That an account might be taken of the amount due to the plaintiffs under and by virtue of the mortgage aforesaid, and the costs and expenses incurred by them in attempting to sell the said lands : that an account might be taken of the value of the said lands : that the defendant might be ordered to pay to the plaintiffs the difference between the value of such lands and the plaintiffs' claim, including the costs and expenses aforesaid : that in default of payment, writs of *feri facias* goods and lands might issue against him : that the defendant might be ordered to pay the costs of suit : that for the purposes aforesaid all proper directions might be given and accounts taken, and for further and other relief.

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Mr. *Muir*, for the plaintiffs.

No one appeared for the defendant.

SPRAGGE, C.—The plaintiffs are a loan company, and the object of the present bill is to make a valuator of land employed by them responsible for loss occasioned by false representations as to the condition and value of the land. January 12.  
Judgment.

[The Chancellor here read the 3rd, 4th, 6th, and 10th paragraphs of the bill as above.]

It thus appears that the defendant was employed by the plaintiffs as their agent to make valuation of the lands of persons applying for loans ; that the defendant was a paid agent ; that his situation, profession, and employment implied the possession in him of knowledge and skill ; that he personally inspected the land in question, with the knowledge that his employers relied upon his truthfulness and correctness ; that his report was untrue in fact, in the particulars stated, and must have been wilfully untrue if, as is alleged, he personally inspected the land. The saleable value may be only a matter of opinion.

1881. As to paragraph 10: It is a charge, put in the alternative. The second branch of the alternative is peculiarly worded: that defendant was guilty of gross neglect unaccompanied by a belief that his representations were true. This was probably to negative *bona fides* in the making of the representations.

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The plaintiffs refer me to the case of *Gowan v. Paton* (a), and I agree that that case was properly decided; but some of the language used in the Court of Appeal in *Silverthorne v. Hunter* (b), appears to me somewhat in conflict with that case; especially in view of the fact that, as appears by the report of that case in 26 Gr. p. 392, the defendant was paid by the plaintiff for making the valuation.

Judgment.

I think, however, that this case may properly be decided as falling within the principles applicable to cases of agency, and the possession, or professed possession of knowledge and skill in the agent. In such cases it is not necessary to establish against the agent fraud, or gross negligence, from which fraud may be inferred, as has been held to be necessary in other cases of untrue representation where the law casts no duty upon the person making the representation.

Mr. *Evans*, in his book on the law of Principal and Agent, p. 238, states the law to stand thus, even in the case of gratuitous agency: "An agent is liable for misfeasance in performing a gratuitous undertaking if he fails to exercise that degree of skill which is imputable to his situation or employment. Any failure on his part to fulfil the obligations imposed upon him as being possessed of the skill which he holds himself out to the world as possessing is actionable negligence."

The learned writer summarizes the case of *Shiells v. Blackburne* (c), and quotes the language of Lord *Loughborough* in that case, which is applicable to the

(a) 27 Gr. 48.

(b) 5 App. 157.

(c) 1 H. Blac. 158.

case before me. He says: "Lord *Loughborough* agreed with Sir *William Jones* (*Law of Bailments*, p. 120) that when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. His Lordship acknowledged, too, that if in this case a ship-broker or a clerk in the custom house had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application under the circumstances of this case is made to a general merchant to make an entry at the custom house, such a mistake as this is not to be imputed to him as gross negligence."

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Mr. Justice *Heath*, said: "The defendant in this case was not guilty either of gross negligence or fraud, he acted *bonâ fide*. If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable."

Judgment.

The case of *Jenkins v. Betham (a)*, more nearly resembles this case than any other that I have met with. The facts are stated shortly at p. 171: "The plaintiff is the rector of Fillingham, near Lincoln. The defendants

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(a) 15 C. B. 168.

1881. are surveyors and valuers at Lincoln, and as such are employed by the Dean and Chapter of Lincoln. The plaintiff having been, in the month of April, 1852, presented to the rectory of Fillingham, vacant by the death of the late incumbent, the Rev. Matthew Hodge, and being desirous of having the dilapidations of the rectory house and premises valued," addressed a letter to the defendants requiring them, amongst other things, to make such valuation.

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The ground of complaint was, that the defendants had made their valuation on behalf of the plaintiff, unskilfully, and in ignorance of the proper principles upon which such valuation should be made, that principle being established by the case of *Wise v. Metcalfe (a)*, a case which, it was stated in the evidence of a surveyor called for the plaintiff, was very familiar to dilapidation surveyors. On the other hand there was evidence for the defendants that they had valued according to the best of their judgment and experience. See p. 175.

Judgment.

It was left to the jury to say whether the defendants supplied that ordinary degree of skill and knowledge which could reasonably be expected from country surveyors and valuers, and the jury found that they did, and gave a verdict in their favour.

A new trial was granted, the duty and liability of the defendants being thus stated by the Chief Justice by whom the judgment of the Court was delivered: "The cause of action is, that the defendants, by holding themselves out as valuers and surveyors of ecclesiastical property, represented themselves as understanding the subject and qualified to act in the business in which they professed to act, and thus induced the plaintiff to retain and employ them; whereas they were ignorant of the subject, and the plaintiff by reason of their ignorance sustained a loss. Their ignorance of the subject and incompetency to act in the business, were

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(a) 10 B. & C. 299.

in part shewn by their failure upon the valuation which subsequently took place; but that was not the whole cause of action. The cause of action was their undertaking that they were competent, and the breach of that undertaking, followed by a loss sustained by the plaintiff.”(a)

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The allegations in the bill before me, and even the alternative charge, go far beyond what is necessary under the case from which I have just quoted, to establish liability against a paid agent having or professing to have skill and knowledge in the matter in which he is employed; and upon that ground he is, in my opinion, liable to the plaintiffs. I place it upon that ground, so as not to be in conflict with *Silverthorne v. Hunter* in appeal, or with any of the principles laid down by the learned Judge by whom the judgment of the Court was delivered.

Judgment.

The decree will be for the plaintiffs, with costs.

The defendant should have liberty to pay the plaintiffs the sum advanced by them with (of course) costs of this suit, the plaintiffs thereupon assigning the mortgage. The decree may be in the alternative.



(a) See *Corporation of Stafford v. Bell*, 31 C. P. 77 ; 6 App. R. 273.

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## OWENS v. TAYLOR.

*Patent for invention—Novelty—Royalties payable under void patent.*

The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a patent; but *P.* having obtained a patent therefor, which he assigned to the plaintiff, who again assigned to the defendant subject to certain royalties.

*Held*, that notwithstanding the invalidity of the patent he was entitled to recover the amounts payable to him under the agreement during the currency thereof.

The bill in this case was filed 2nd October, 1879, by *Henry Owens* against *George Taylor*, setting forth (1) that by letters patent duly issued under the seal of the Dominion of Canada, and dated the 17th day of July, 1872, there was granted to one *Charles Powell*, therein named his assigns, and legal representatives, for the period of five years from the date of the said letters patent, the exclusive right, privilege, and liberty of making, constructing, and using and vending to others to be used a certain invention of the said *Charles Powell*, called or known by the title or name of "The Cone Pump and its connections," a full description

Statement. whereof and the specifications and drawings relating to the said invention were annexed to the said letters patent; (2) that while the said letters patent were in full force and validity, the said *Charles Powell* by an instrument under seal granted and assigned to the plaintiff all the right title and interest of the said *Powell* in the said invention and in the said letters patent for and the exclusive right, privilege and liberty of making constructing and using the said invention, and vending the same to others to be used, within the counties of Peterborough and Victoria, and the township of Cavan, during the term of said letters patent; (3) that while the said letters patent were in full force and validity, and after the plaintiff had acquired the said interest therein previously described,

an agreement was entered into by and between the plaintiff and defendant, and by an instrument under the respective seals of the plaintiff and defendant, dated the first day of May, 1875, the plaintiff granted to the defendant the right to manufacture and sell the said invention within the said counties of Peterborough and Victoria, and the township of Cavan, for the period of two years from the date of the said instrument, and in and by the said instrument the defendant covenanted and agreed, amongst other things, to pay or cause to be paid to the plaintiff the sum of one dollar for every force pump and the sum of fifty cents for every lift pump he should manufacture and sell under the said agreement, and that he would also at least once in every three months, and as often as he should be required so to do by the plaintiff, furnish him with a statement shewing all the pumps he had manufactured and sold under the said agreement, and would also at least once in every three months pay over the amount of money due and owing to the plaintiff under the said agreement; (4) that while the said letters patent were in full force and validity, and before the expiration of the term of five years therein mentioned as the duration thereof, the said *Charles Powell*, in pursuance of the provisions of the statute in that behalf, made application for an extension of the duration of the said letters patent; and such application was granted, and letters patent were duly issued to the said *Charles Powell* dated the 16th day of July, 1877, granting to him, his assigns and representatives, the exclusive right, privilege, and liberty, of making, constructing and using, and vending to be used, the said invention for a further period of five years from the date of the said last-mentioned letters patent; and that the same still continued in full force and validity; (5) that by an instrument under seal dated the 15th day of November, 1878, the said *Charles Powell*, for a valuable consideration, granted

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and transferred to the plaintiff all the right, title, and interest of the said *Charles Powell* in the said invention, and the said letters patent, for and within the limits of the counties of Peterborough and Victoria, for the full period of the term of the said letters patent; and the plaintiff claimed that he was then, and had been ever since the date of the said instrument, solely and exclusively entitled to manufacture, construct, use, and vend to others to be used, the said invention within the limits of the said counties of Peterborough and Victoria; (6) that the said *Charles Powell* was the first and true discoverer of the said invention, which the said bill alleged was new and useful, and consisted (as by reference to the specifications and drawings annexed to the said letters patent, which were too lengthy to be conveniently set forth in the said bill in full, would appear) of, first, a cone-shaped pump head or stock; second, an oscillating or rocking support for the fulcrum pivoted, or secured at or near the ground; third, the combination of the oscillating support with a wooden pump; and, fourth, the arrangement of two cylinders and connecting chamber with the lever connecting with plunger rods in the cylinder; (7) that under the agreement in the third paragraph of said bill mentioned the defendant manufactured and sold a large number of force and lift pumps according to the said invention, and by reason thereof became indebted to the plaintiff in a large sum of money under the terms of the said agreement; but although he had made some payments on account of such indebtedness he had not paid or caused to be paid to the plaintiff the full amount due or owing to him for pumps manufactured and sold by the defendant under the said agreement, and that there then remained a large sum due and payable from the defendant to the plaintiff under the said agreement; (8) that the defendant, although frequently requested by the plaintiff so to do, had neglected and refused to furnish the plaintiff with

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a statement shewing all the pumps manufactured and sold by him, and to pay over to the plaintiff the amount of money due and owing to him under the said agreement; and that the plaintiff was unable, without the aid of this Court, to ascertain the number of pumps so manufactured and sold, and the amount due and owing by the defendant, under the said agreement; (9) that the plaintiff was a manufacturer of pumps and had been since the date of the said last mentioned transfer from the said *Charles Powell*, engaged in manufacturing and selling cone pumps made and arranged under and in accordance with the said patent, and that the plaintiff had spent large sums in advertising the said pumps, and they had acquired a good reputation amongst persons requiring to use pumps, and that the pumps so made and sold by the plaintiff had been continually gaining favour with the public and commanding an increased sale; (10) that since the 15th day of November, 1878, the defendant had without the authority or licence of the plaintiff been manufacturing and selling to others within the limits of the said counties of Peterborough and Victoria large numbers of pumps precisely similar, or in close imitation of the pumps manufactured by the plaintiff under the said invention and patent, and that the defendant held himself out to others as the manufacturer and vendor of cone pumps, and thereby led and induced intending purchasers to believe that the pumps so manufactured by him were cone pumps, the subject of the said invention, and that by that means the defendant was enabled to sell and dispose, and that he had sold and disposed of numbers of pumps in infringement upon the said patent and invention and in violation of the plaintiff's rights, and that he had thereby deprived the plaintiff of large gains and profits which he would otherwise have derived from the sale of pumps manufactured by him in accordance with said patent; (11) that the said pumps so manufactured and sold by the

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defendant were of inferior workmanship and material, and that by the sale thereof as cone pumps the reputation of the plaintiff's pumps was diminished, and the plaintiff thereby injured in his said trade; and the defendant threatened and intended, and he would unless restrained, contrive to sell pumps made similar to or in close imitation of the said cone pump; and that he had then a large number of said pumps on hand which he was offering for sale in spite of the plaintiff's remonstrances; (12) that the plaintiff had been greatly injured by the said wrongful acts of the defendant, and that he would be further injured by a continuance thereof. And the plaintiff submitted that the defendant ought, in addition to such other relief as the plaintiff was entitled to against him in respect of the matters in the plaintiff's bill set forth, to be directed to compensate the plaintiff for the damage sustained by him by reason of the defendant's wrongful act, as well as to account for the gains and profits made by the defendant by such wrongful manufacture and sale of pumps as aforesaid; (13) that the defendant alleged and pretended that the said letters patent were invalid and void upon various grounds; but the plaintiff alleged that the said patent was valid and in full force and virtue, and further that the defendant, having accepted the agreement in the bill mentioned, and acted upon and dealt with the plaintiff in respect of the same, was estopped and debarred from setting up any alleged invalidity of the said letters patent, and that he could not be heard to do so in this or any other suit in respect of the matters thereinbefore set forth.

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The prayer of the bill was, (a) that the defendant might be ordered to account to the plaintiff for all pumps manufactured and sold under the agreement in the third paragraph in said bill set forth, and to pay to the plaintiff the amount of moneys due and owing to him under the said agreement; (b) that the defendant,

his servants, workmen, and agents, might be restrained by the order and injunction of the Court from manufacturing and selling pumps in infringement upon the said invention and the said letters patent, and in violation of the plaintiff's rights, and from holding himself out to others as the manufacturer and vendor of cone pumps or pumps made similar thereto or in close imitation thereof; (c) that the defendant might be ordered to deliver up or destroy all pumps then held by him which were an infringement upon the said invention and the said letters patent; (d) that an account might be taken of the gains and profits which the defendant had made by the sale of such pumps as aforesaid, and that he might be ordered to pay the same to the plaintiff; (e) that the defendant might be ordered to compensate the plaintiff for the damage occasioned to him through the aforesaid wrongful acts of the defendant; (f) that the defendant might be ordered to make full discovery of all the aforesaid matters, and might be ordered to pay the plaintiff his costs, and that for the purposes aforesaid all proper accounts might be taken and directions given, and for further relief.

The defendant answered, setting forth that the plaintiff and defendant were both manufacturers and vendors of pumps carrying on business at the town of Peterborough, each upon his own account, and had so been engaged for some years past. That, in the course of such business he manufactured and sold, as did a number of others engaged in the same business in Peterborough and neighbourhood, a pump known by the name of the cone pump; and the defendant submitted that the plaintiff had no such special right in respect of the said name. That, such being the case, one *Charles Powell*, in the plaintiff's bill of complaint named, asserted that the manufacture and vending of such pumps as were then being made was an infringement of an alleged patent which he claimed the benefit

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of, and being the patent mentioned in the first paragraph of the plaintiff's bill, and threatened to institute proceedings against defendant for an alleged infringement thereof. That the defendant believed it to be true that the said *Powell* made and executed the instrument mentioned in the second paragraph of the plaintiff's bill of complaint, and that such assignment was so made for a small or nominal consideration. That it was then proposed by the plaintiff that defendant should take from him a license to make and vend for a limited time, paying to the said plaintiff a fixed sum in respect of each pump which defendant might manufacture and sell during such period, and that proceedings would be taken against other pump makers to establish the validity of said alleged patent, and to restrain all infringements of the same; and that upon such basis and understanding defendant entered into a certain agreement under seal with the plaintiff, under which defendant was to be at liberty to manufacture and sell for the period therein named, and was to pay the plaintiff 50c. each for all "lift pumps," and \$1 each for all "force pumps," and was to pay nothing for cistern pumps, as would appear from the said instrument when produced, but that the said agreement was only for a limited time, which expired before defendant made the pumps of which the plaintiff complained in his bill. That, notwithstanding the allegations and promises of the plaintiff, no proceedings were ever taken to establish the validity of the said alleged patent, and other makers continued to manufacture pumps of the same description as those made by defendant, and to sell them in the same district during the period of two years, covered by the said agreement; and in consequence the defendant did not derive from the said agreement the benefits intended thereby. And defendant submitted that, if necessary, the said agreement should be set aside and rescinded, or that it should be declared to have no efficacy as against de-

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fendant. That defendant in good faith paid to the plaintiff, as he had agreed, the said allowance in respect of all the pumps made by him and sold in the district within the said two years and furnished him a statement or statements of account as to the same, and that there was nothing due as between them by defendant in respect of the agreement in the said bill mentioned; and the defendant denied that the pump he had been making and vending was an infringement of any patent, and alleged that in so far as such pump was concerned that neither the cone shaped pump head or stock; or, second, an oscillating or rocking support for the fulcrum pivoted or secured at or near the ground; or third, the connection of the oscillating support with a wooden pump—being the only particulars in which the pump made by defendant was like said alleged patent pump—were new and useful and such as could be properly and lawfully the subject of a patent. But, on the contrary, defendant alleged that the said patent was void for want of novelty, and that the alleged invention covered thereby had been well known to the public and in use by them long before the alleged invention of the said *Powell*, and long before the issue of the said alleged patent. That the said *Powell* was not the first and true discoverer of his said alleged invention; and he shewed that the specifications and descriptions of the said alleged invention were void and invalid for uncertainty and insufficiency of description, and because more or less was contained therein than was requisite for the practical making and working thereof; and because claims were made therein and thereby which were for inventions void of novelty and utility, and were not susceptible of being protected by a patent. That defendant had no knowledge of the existence of the assignment alleged to have been executed by the said *Powell* to the plaintiff on the 18th day of November, 1878; but did know, and the truth was, that many months after, and during the

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year 1879, the said *Powell* and the said plaintiff together saw the defendant as to his alleged infringement of the said alleged patent; and that both at such times represented to the defendant that the plaintiff had no interest whatever in the matter, and that the rights which the said plaintiff at one time had under such alleged patent had expired, and that under a certain renewal or extension thereof the said *Powell* alone was entitled to complain of the defendant's alleged infringement; but the defendant on these occasions denied, and still denied, that he had been or was guilty of any infringement. And defendant prayed, should the same become at all material, that the true time of the execution of the said alleged assignment and the circumstances attending the same might be ascertained and discovered. That defendant believed that the said alleged assignment and the circumstances attending the same might be ascertained and disclosed. That defendant believed that the said alleged assignment was part of a scheme or contrivance between the said plaintiff and the said *Powell* to prejudice defendant in his right to set up the invalidity of the alleged patent, in consequence of the agreement into which defendant entered as before set out with the plaintiff, and under which defendant manufactured pumps for a limited time, it being contended by them that the effect of such would be to estop and debar the defendant from setting up such invalidity in a suit brought by the plaintiff against defendant for infringement. And the defendant submitted that should such be considered to be the legal effect of such instrument he should, under the circumstances above set out be relieved therefrom, and be permitted to shew the invalidity of the alleged patent notwithstanding the said agreement so made between himself and the plaintiff; but the defendant submitted that notwithstanding the said agreement he was thereunder only a licensee, and that the statements therein

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contained, whatever their form, could only be had and taken as an estoppel upon him in any proceedings upon such agreement, and not in the collateral matter of an alleged infringement occurring after the time covered by said agreement; that he should not be compelled to answer a bill containing such diverse complaints as the plaintiff's bill contained, namely a complaint of infringement of patent and alleged breach of contract to pay certain moneys under a certain agreement, and he craved the same benefit as if he had demurred. The defendant charged that the real and true plaintiff in the suit was the said *Charles Powell*, that the whole proceedings had been instituted by him, and that he had obtained the use of the plaintiff's name by promises of indemnity of some kind; and that without such maintenance and assistance on the part of the said *Powell*, the said plaintiff would never have instituted any such suit as the present; and defendant prayed by way of cross relief that the said patent and the extension thereof might be declared to be null and void for the reasons aforesaid, and submitted that the said *Powell* was a necessary party to the suit.

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The cause having been put at issue, came on to be heard at the Autumn Sittings in Peterborough, in 1880.

Mr. *Moss*, for the plaintiff.

Mr. *Boyd*, Q. C., contra.

On the case being opened, Mr. *Boyd* objected that the pleadings shewed clearly the plaintiff was relying upon two inconsistent claims; (1) for remuneration under the agreement; and (2), for relief in respect to the alleged infringement of the patent. In regard of the latter ground, he contended that *Powell*, if any one, was the party injured, and should be present to ask to

1881. restrain the defendant from any further infringement if entitled to such relief.

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Subsequently, it was arranged that *Powell* should be made a co-plaintiff; counsel for the defendant agreeing to go on and contest all the matters in issue; waiving all objections on the ground of multifariousness or misjoinder of parties.

The points relied on, and cases cited by counsel, appear in the judgment.

Feb. 10th.

PROUDFOOT, V. C.—There must be an account of what is due to the plaintiff for royalties under the agreement with the defendant, for leave to manufacture the patented pumps. The costs will be reserved until the account has been taken.

But I do not think there ought to be any account beyond the time covered by the agreement, as the estoppel under the agreement only affected the defendant in regard to matters occurring while it was in force; and as, in my opinion, the patent is void for want of novelty.

Judgment.

The patent issued 17th of July, 1872, for "the Cone Pump and its connections" for a period of five years, and on the 16th of July, 1877. it was extended for another period of five years. *Powell*, the patentee, in the specifications attached to the patent, claimed as his invention:—

1st. The cone shaped pump head or stock.

2nd. The oscillating or rocking support for the fulcrum, pivoted or secured at or near the surface of the ground.

3rd. The combination of the oscillating support with a wooden pump.

4th. The arrangement of two cylinders and connecting chambers with the lever connecting with plunger rods in the cylinder.

And these were the improvements in pumps covered by the patent.



There was abundant evidence that the cone shape was not new, pumps tapering in a similar way, for a similar purpose, to enable them to be banded, and thus give additional strength, having been long in use. It had been used, according to different witnesses, from fifty years downwards.

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*Powell* himself says : “ The oscillating fulcrum is an old thing. Fastening it to the side of the pump is an old thing. The advantage of mine is, fastening it nearer the ground.”

The rocking support or fulcrum also was shewn by several witnesses not to be new. Similar rocking supports are figured in the *Scientific American* for 1856 and 1857, and Reports of the Patent Office of Washington for 1855, 1857, 1859, 1860, 1862, and 1868, which involve the same principle, but differ in the mode of attachment to the pump, some being nearer the top of the stock. One witness saw, forty years ago, a pump with a rocking support used for pumping water in York, in England, and the fulcrum rested on the ground, and fastened about eight inches from the base of pump. Another witness said that thirty-two years ago he worked at the tin mines in Cornwall, where pumps with the oscillating fulcrum were to be seen on every ledge.

Judgment.

The patent is for a fulcrum attached at or near the ground. In the diagram attached to the specifications it is not attached to the pump itself, but to a stand upon which the pump rests. *Powell* says that before he got his patent he saw an oscillating support set up on the top of the spout, (that would be about half way up the stock). He attaches his to the stock. The nearer to the ground the better. It would need experiment to determine how far from the ground it could be used with advantage. Without having made such experiments it seems to me impossible to say that attaching the support six inches, twelve inches or eighteen inches lower, could be the subject of a patent.

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The combination of the oscillating support with a wooden pump does not seem to have been new, any more than the parts of which it was composed. But I apprehend that changing the material of the stock would not render that patentable which was not so before.

The fourth claim, set out above, has never been used, and is therefore void. (35 Vict. ch. 26, sec. 28 D.)

Judgment.

It would be of little use to give a lengthened analysis of the cases. I have referred to all those that were cited to me, and others. They appear to establish that the element of invention is wanting in this case.

*Abell v. McPherson (a), Hessin v. Coppin (b), Gillies v. Colton (c), Yates v. Great Western R. W. Co. (d) Bowman v. Taylor (e), Patrick v. Sylvester (f).*

So far as the bill seeks an account after the expiration of the agreement, it is dismissed, with costs.

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(a) 17 Gr. 23, 18 Gr. 437.

(c) 22 Gr. 129.

(e) 2 A. & E. 278.

(b) 19 Gr. 629, 636.

(d) 24 Gr. 495, 2 App. R. 226.

(f) 23 Gr. 580.

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## MCARTHUR V. GILLIES.

*Riparian owners—Water's edge—Boundaries—Obstructions to flow of water.*

Under a conveyance of land, on a stream not navigable, described as running from, &c., "south, &c., to the northern side of the \* \* river, \* \* then north-easterly along the bank of the said river, with the stream to the centre of the said lot." *Seemle*, that the grantee was bound by the bank of the river, and had not any right to extend the boundaries to and along the middle or thread of the stream; but, *held*, whether he had or had not such right, he could not by reason thereof erect any structure in the stream that could or might affect prejudicially the flow of the water as regards other riparian proprietors.

This was a suit by *Archibald McArthur* and *William Hamilton Wylie*, against *John Gillies*.

The amended bill, which was filed on 9th April, 1880, set forth that, in the year 1870 the plaintiff *McArthur* was seized in fee simple of all and singular that certain parcel or tract of land situate in the township of Beckwith, in the county of Lanark, containing by admeasurement one acre, be the same more or less, being composed of parts of the north-east half of lot number 14, and the south-west half of lot number 15 in the 12th concession of the said township of Beckwith therein more fully described. That the plaintiff *McArthur* ever since continued to be seized of said lands, subject to the demise to the plaintiff *Wylie* thereafter mentioned. That in and prior to the said year 1870 the plaintiff *McArthur* was also seized in fee simple of certain other lands containing about fifteen acres, and in said bill more fully described, which parcels of land were immediately adjoining and contiguous to the lands described in the first paragraph of the bill, and the plaintiff *McArthur* had ever since continued to be seized of the said parcels of land, subject to the demise to the plaintiff *Wylie* thereafter mentioned. That in or about the said year the plaintiff *McArthur* com-

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1881. menced the erection of a woollen factory upon the parcels of land in said bill secondly described, and the same were completed in or about the year 1871, and at or about the same period the plaintiff *McArthur* caused to be constructed a certain mill race and flume for the purpose of working the machinery used in the said woollen factory and for other purposes, and that the said mill race and flume had ever since continued to be used for the purpose of working the machinery in said woollen factory and for such other purposes; that the said mill race and flume were constructed upon the river Mississippi so as to pass through part of the lands described in the first paragraph of said bill, and part of the lands described in the second paragraph thereof, and that the supply of water therefor was derived from the said river Mississippi; that on or about the 10th day of February, 1877, the plaintiff *McArthur* demised the said woollen factory together with the lots appurtenant thereto and commonly used and enjoyed therewith, and also the said mill-race and flume and the lands in the first paragraph mentioned, to the plaintiff *Wylie*, to hold for the term of three years to be computed from the said 10th day of February, 1877, and the plaintiff *Wylie* was then in possession of such lands under such demise: that in or about the year 1873 the defendant was and continued to be the owner in fee simple of certain lands lying immediately to the north of the lands of the plaintiff therein before described and on the northerly side of said river Mississippi, and opposite the said woollen factory, such lands of the defendant being portions of lots therein more fully described, and the south-easterly boundary thereof being the north-westerly bank of the said river Mississippi: that in or about the year 1874, the defendant erected upon his said land a certain foundry and machine shop requiring some motive power for the working of the machinery therein, and about that time or shortly after the

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erection by the defendant of said foundry and machine shop, the defendant commenced the construction in the bed of the said river Mississippi of a stone wall and wing dam extending up the stream of said river from the most northerly of certain railway piers then built and standing in said river, to excavate portions of the bed of said river, and to make a certain cutting adjoining said river, and also to lay certain masonry work in the bed of the river to the east of the said railway pier, the effect of which construction of such wall and wing dam, and of such excavation and cuttings and masonry work, if completed, would have been to alter the flow of the river towards the southeasterly bank thereof, and to divert the waters from the said mill-race and flume of the plaintiffs, whereby the proper and efficient working of the said woollen factory would have been interfered with owing to the diminished supply of water coming through said mill-race and flume: that the construction of such wall and wing-dam as partially effected, and of the partial excavation and cuttings made by the defendant, was to alter to some extent the flow of the waters of said river: that upon the plaintiff *McArthur* discovering that the defendant was constructing such wall and wing-dam and making such excavations and cuttings and masonry work, he caused a notice to be served upon the defendant informing him of the rights of the plaintiff *McArthur*, and also requiring him not to excavate any portion of the bed of the river within the limits owned by the plaintiff *McArthur*, or by means of any excavation theretofore made or that he might thereafter make, or otherwise to divert the river or any portion thereof from its natural course; or remove, quarry, or dig up any portion of the bed of the said river owned by the plaintiff *McArthur*, or do or commit any act or thing that would in any wise interfere with the rights of the plaintiff *Archibald McArthur* in and to his said premises; and further notifying the

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1881. defendant that the said plaintiff would not allow the defendant to draw away the water of the said river by means of the excavations, cuts, or otherwise, or to use the waters of the said river for any purpose whatsoever to the prejudice of the plaintiff *Archibald McArthur*.

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The bill further set forth that upon being served with such notice the defendant ceased from the further construction of said wall and wing-dam and masonry work, and from the excavation of the bed of the said river, and caused to be erected a certain dam or structure connecting the most westerly point of the wall and wing-dam as already built by the defendant, with the north-westerly bank of the river, the effect of which was to restore the flow of the waters of the said river substantially to their ordinary course, and to that in which they flowed before the partial construction of said wall and wing-dam, and masonry work by the defendant; that at or about the beginning of the month of November, 1879, the defendant removed the

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dam or structure above mentioned as connecting the most westerly part of the said wall and wing-dam with the north-westerly bank of the river, thus again altering the flow of the waters of the river and interfering with the rights of the plaintiff, and that the defendant had commenced the construction of a certain wall in the bed of the river in further continuation of the wall and wing-dam thereinbefore mentioned as having been constructed by him, and had also commenced further to excavate the bed of the river, and that the defendant threatened and intended and would, unless restrained, construct such a wall in the bed of the river and would make such excavations, and erections, and cuttings therein as would materially and seriously interfere with the plaintiffs' rights and greatly alter the flow of the waters in said river towards the south-easterly bank thereof, and draw off and divert the said water from the said mill-race and flume of the plaintiffs, whereby the proper and efficient working

of said woollen factory would be interfered with; and that the machinery therein could not properly be worked nor could the necessary operations thereof be properly carried on owing to the diminished supply of water coming through the said mill-race and flume, and would also greatly diminish the supply of water flowing past the plaintiffs' said lands, and reduce the volume thereof in an improper and unreasonable way: that the said stream was not navigable, and that the plaintiff *McArthur* was the owner of the bed thereof; and the plaintiffs shewed and claimed that the defendant had no right or authority to erect any structures resting upon the bed of the said river as the said dam and wing wall did, and that the said structures were acts of trespass on the property of the plaintiff *McArthur*, and should be abated; that the said defendant by his answer to the original bill contended that under and by virtue of the conveyances in the said answer set out, he was seised in fee of a portion of the bed of the river opposite the lands of the said defendant, but that the plaintiffs denied that such was the case, and alleged that the fact was that the said defendant had no interest whatever in the said river: that the said defendant by his said answer contended that by virtue of the Statute of Limitations he was entitled to the use of the said river as a riparian proprietor, and to construct the works complained of, but the plaintiffs denied that the defendant had acquired any rights under the Statute of Limitations, and that the defendant had ever used the waters of the river for any purposes connected with his said land, and that even if he were entitled to the rights claimed, the plaintiffs submitted that he was not entitled to erect the obstructions in question: that the defendant by his said answer complained of certain alleged works of the plaintiffs erected and made by *McArthur* on his said premises, but the plaintiffs submitted that even if entitled to any relief, which the

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1881. plaintiffs did not admit, such relief could not be afforded the defendant by way of cross-relief, but were proper subjects for a bill; and the plaintiff *McArthur* further submitted that he had a right to make the erections and works made and executed by him, and they did not in any way affect the rights of the defendant: that the said works and erections had been constructed for nearly ten years: that they were constructed with the knowledge and acquiescence of the defendant, and that no objection was ever made to such erections, and that the plaintiffs had spent large sums of money thereon with the knowledge and acquiescence of the defendant; and if otherwise entitled to any relief, the plaintiffs submitted that the defendant was estopped by his acquiescence and laches from claiming such relief; and the plaintiffs further submitted, and the fact was, that from time immemorial a stream of water flowed from the said river Mississippi over the lands of the plaintiff *McArthur*, where the plaintiffs' said flume existed, and the plaintiffs merely cleaned out the bed of the said stream, and had not diverted any water from the said river which would not naturally flow over the lands of the plaintiffs.

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The prayer of the bill was, (1) that the defendant might be restrained by the order and injunction of the Court from constructing the said wing wall and dam, or any extension thereof, or in any way altering the flow of the water of the river Mississippi from the direction in which it had hitherto flowed towards the south-east bank of said river, and from diverting the said waters from the said mill-race and flume of the plaintiffs, or in any way diminishing the supply of water coming through the said mill-race and flume, or through the said river as it passed the plaintiffs' said lands; (2) that the defendant might be restrained from erecting any dam, wing-wall, or other structure resting upon the bed of the said river, and that the erecting of the said dam, wing-wall and other



structures by the defendant, might be declared to have been and to be trespasses and continuing trespasses on the property of the plaintiffs, and that the same should be abated; (3) that the defendant might be ordered to remove the said obstructions erected by him as aforesaid, and from continuing any interference with the rights of the plaintiffs thereby; (4) that an account might be taken of the loss and damage sustained by the plaintiffs by reason of the alteration made and the wrongful conduct of the defendant, and that the defendant should be ordered to pay the same.

The defendant by his answer set up that, under and by virtue of a conveyance from one *John Murphy*, who was the grantee of the patent of the Crown to one *Thomas Baines*, and of divers mesne conveyances, he, the defendant, was the owner of all those parcels or tracts of land lying on and bounded by the said Mississippi River in said bill of complaint mentioned, and which were in said answer more fully described; that the plaintiff derived title to the parcel of land which he claimed to own and the metes and bounds of which were set out in the first paragraph of the said bill of complaint, from the said *John Murphy*, in the previous paragraph of the answer named and from one *William Murphy*, the patentee of the crown of the east half of lot number 14 in the said 12th concession of said township, and that although the conveyances from the said *John Murphy* and *William Murphy*, purported to bear date and to have been executed prior to the time of the execution of the conveyance to the said *Thomas Baines* in the first paragraph of defendant's answer mentioned, the last of such conveyances was registered in the proper registry office in that behalf prior to the registration of the conveyances under which the plaintiff *Archibald McArthur* claimed to derive title; and he denied it to be true, according to his information and belief, that plaintiff had any title or pretence of title to the north half or part of the said river Mississippi,

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1881. or the north part of the bed of the said river where it passed through the said lot number 14; and the defendant claimed and insisted that the plaintiff was not the owner or entitled to the bed of the stream or any portion thereof, either where it passed or flowed through said lot number 14 or through said lot number 15, even although it should appear that he might have a conveyance therefor as alleged in his bill of complaint; that one *Alexander McLaren*, or those claiming under him, were, as was claimed by them, and had been since the 12th day of April, 1850, the owners of the land being a portion of the bed of the said river and abutting thereon and more fully described in the answer; that the said last mentioned property abutted on and was contiguous to a portion of the property belonging to the defendant which was thereinbefore described as lying along the northerly bank of the said river or stream: that the defendant, and those under whom he claimed, had the uninterrupted use and undisturbed enjoyment of the riparian rights of and to the said river Mississippi of and belonging and appertaining to the occupation of the parcel of land which was thereinbefore mentioned, which he had owned for a period of more than twenty years before the plaintiffs, or those under whom they claimed, made any use or in any way interfered with the said river, or the waters thereof, or the flow of the same, which in fact the plaintiffs, or those through whom they claimed, or any of them, did not do prior to the erection of the woollen mill and erections conected therewith, as in the said bill was alleged; that the plaintiff *McArthur* in or about the year 1870 or 1871, or subsequent thereto, and in connection with and for the purposes of the said woollen mill, which he erected as set out in the plaintiffs' bill, and especially for the purpose of diverting the waters of the said river into the said mill-race and flume therein also mentioned, built, or caused to be built and constructed, certain piers or wing-dams, one of which

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extended from or near to the land on the south bank of the said river on said lot number 15, near to the eastern side of the entrance of the said mill-race, in a westerly direction, to and connecting it with the southerly pier of the bridge of the Canada Central Railway Company erected across the said river, and the other from the westerly side of the said railway bridge pier, still in a westerly direction, and in or near to the centre of the said stream for a distance of about two hundred feet up the river: that the said piers or wing-dams were placed in the bed of that portion of the stream opposite to the land which defendant owned as aforesaid abutting on the north side thereof, and that they did in fact divert the course of the said river and the waters thereof from their natural course, and by reason thereof the waters thereof, or some part thereof, which would otherwise flow down the said river where it passes along by the defendant's said land were diverted and caused to flow into the plaintiffs' mill-race and flume; and the defendant claimed that by reason of being the owner of the said parcel of lot 15 lying along and on the north side of the said river, where it flowed through lot 15, he was entitled to riparian rights in the said river, and amongst them to the right to the use of the waters of the said stream, for the purposes of working the machinery of any factory or factories or such like property that he might have on his land, so long as he did not injure the rights of any person or persons owning or having property along the river, or interfere with the natural flow of the same to his or their prejudice; and that he was in like manner entitled to have the said stream where it flowed by his land flow in its natural channel undiverted in its course, and undiminished in its quantity; and he claimed that even if by virtue of the said conveyance of the said land to him he was not entitled to the rights of a riparian proprietor, he had by the undisturbed enjoyment and use thereof for

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a period of more than twenty years prior to the time when the plaintiff *McArthur* first commenced to use or interfere with the waters of the said stream, acquired the full and complete rights of such riparian proprietor; that even if the plaintiffs, or either of them, was the owner of the bed of the said stream, or any part thereof, (which the defendant did not admit) he insisted that such alleged proprietorship did not give to the plaintiffs, or either of them, the right to erect or construct any break-water, pier, dam, or other erections which interfered with the flow of the waters of the said stream in their natural course. The defendant admitted, however, the erection of the machine shop mentioned in the seventh paragraph of the bill, and claimed to use, for the purpose of working the machinery to be used therein, as a motive power the waters of the said stream, and that the structure which the plaintiff in and by his bill complained of the defendants erecting was so erected, or in course of erection along the

Statement. edge of the northern bank of the said stream, and he claimed to be entitled to continue the erection thereof to protect his lands from the waters of the stream: but he denied, as alleged in the tenth paragraph of the plaintiffs' bill, that it was in consequence of being served with the notice mentioned in the ninth paragraph thereof, that the defendant desisted and discontinued the construction of the said wall and masonry, but on the contrary alleged that the dam or structure mentioned in the said tenth paragraph as connecting the most westerly point of the wall therein called a wing dam, with the north-westerly bank of the said river, was built by him for the purpose of preventing logs and rubbish during freshets from gaining access to the mill-race constructed by him, and not for any such purpose as in the said tenth paragraph was alleged; and he claimed that by the construction of such wall and masonry he was doing no more than as such riparian proprietor, in the exercise of his riparian

rights, he was entitled to do on the said stream, or on the bank or edge thereof; and in any event he insisted that he was not in so erecting said work interfering prejudicially or in any manner with the rights of the plaintiffs as riparian proprietors or otherwise, and that the plaintiffs were not entitled to complain of anything he was doing, or intended to do, as aforesaid; and he submitted that the plaintiffs, in the erection and maintaining of the said piers and wing dams as mentioned in the eighth paragraph of his answer, were so obstructing the course of the stream, diverting the current thereof, and diminishing the quantity of water which would otherwise flow past defendant's land, that his riparian rights were greatly injured and prejudiced, and that he was damaged, or might have been damaged thereby; and he prayed, by way of cross-relief, that the plaintiffs might be ordered to remove the piers, structures, and obstructions from the said stream or the bed thereof, so as to permit the waters thereof to flow in their natural direct channel without being diverted as aforesaid; and further, that if it should appear—as the defendant charged that it would appear—that, irrespective of such piers, the plaintiffs had by the manner in which they or one of them had constructed the mill-race and flume diverted the waters of the said stream from their natural channel: that they ought to be ordered to restore the bank to its natural position, so as to permit the waters of the stream to flow in their natural and proper channel and course, and prayed such additional relief accordingly; but should it appear that, in the use of the said waters of the stream for the purpose of working the machinery, he had then or might put in his said machine shop so erected as aforesaid, that he would or might be encroaching on the riparian rights of the plaintiffs, or either of them, he claimed that the Court ought to exercise the jurisdiction conferred by the Revised Statutes of the Province of Ontario, chaptered 114, and entitled “An Act respecting

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1881. Water Privileges," or the Judge of the County Court of the County of Lanark within the limits of which the property of the plaintiffs as well as his was situate should do so; and he claimed to be entitled to the rights and privileges conferred by the said statute, and to be permitted to shew at the hearing of the cause evidence of the matters and things requisite and necessary to make the statutable jurisdiction which he invoked to be exercised in his behalf; and upon his establishing to the satisfaction of the Court that he was in the possession of an occupied mill privilege within the meaning of the said Act and that the same was held *bonâ fide* as required thereby, and was intended to be used for mechanical and manufacturing purposes, he prayed that the Court might order that he should be at liberty to exercise such powers, and that the time of such occupation and the terms and conditions thereof might be likewise determined.

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The cause came on for the examination of witnesses at the sittings at Brockville in the Spring of 1880.

Mr. *W. Cassels*, for the plaintiffs.

Mr. *Bethune*, Q. C., and Mr. *Jamieson*, for the defendant.

The authorities referred to appear in the judgment.


Oct. 27th. SPRAGGE, C.—The plaintiff complains of certain erections and excavations in the bed of the river Mississippi by the defendant, which he says have the effect of diverting, to some extent, the flow of the waters of the river from the south side owned by him, to the north side, which the defendant claims to be owned by himself.

Judgment.

The east half of lot 14, 12th concession of Beckwith, was granted by the crown to *William Murphy*, in

June, 1824, and at the same date the west half of lot 15 in the same concession, was granted to *John Murphy*. The river runs through or across these parcels in a direction generally easterly. The works complained of are in the bed of the river on the west half of lot 15. The river at this part of it is shewn by the evidence not to be navigable. There is some conflict of evidence upon this point, but I think it appears clearly that the river is not navigable.

The defendant claims through Mr. *Thomas Baines*, to whom *John Murphy* in 1837 conveyed what the deed calls the rear part of the west half of lot 15. The description is from the north-west angle of the lot south 36 deg. east, to the northern side of the Mississippi River. That description *by itself* would import a conveyance to the middle thread of the river. The next course is, "then north easterly along the bank of the said river, with the stream, to the centre of the said lot." The next course is, to the rear of the concession and is immaterial. The plaintiff denies that a

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In *Kains v. Turville* (a), Mr. *Draper*, then Chief Justice of Appeal, held that a description of land on a stream not navigable, one course being to the water's edge or to the bank, carries the grant or conveyance to the thread of the stream; and that the description continuing along the water's edge or along the bank will extend along the middle or thread of the stream, unless qualified by the context. It was not however necessary for the decision of that case to say anything as to the effect of a description to or along the bank of a stream, for the description in that case was "to the water's edge of Kettle creek, then keeping along the water's edge of said creek with the stream, until the said creek intersects," &c.

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(a) 32 U. C. R. 17.

1881. In a case in the Supreme Court of the State of New York, *Child v. Starr* (a), Chancellor *Walworth* puts a case almost precisely similar to the case before me: “If the grantor, however, after giving the line to the river, bounds his land by the bank of the river, or describes the line as running along the bank of the river, or bounds it upon the margin of the river.” In any of these descriptions, the learned Chancellor considered that the grantor would not indicate an intention to convey any part of the bed of the stream. In *Robertson v. Watson* (b), in appeal, Chief Justice *Richards* quoted this language of Chancellor *Walworth* with approval.

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On the north bank of the river along the west half of lot 15, is a well defined rocky bank; and I incline to think from the terms of the description, it was intended that it was to that that the conveyance should extend, and not to embrace any part of the bed of the stream.

Judgment. The plaintiff claims title to a portion of lot 14, and a portion of lot 15, which adjoins it on the east, by conveyance from one *Hugh Boulton* of a portion of both lots; *Boulton* having a conveyance from both of the patentees of the Crown. On lot 15 he has title through *Boulton* to a “mill site on the river Mississippi,” composed of portions of the two lots, being on lot 14 a piece of land one chain in width, running up the stream 153 feet from the division line between the two lots, with the whole of the river opposite thereto; and being on lot 15 half a chain in width, parallel with the stream, through the whole breadth of the half lot patented to *John Murphy*, “together with the whole of the river from the south east side to the opposite bank on the north-west side, with the right and privilege to make a flume or slide from the upper dam; also the right to clear or deepen the channel

(a) 4 Hill 369.

(b) 27 C. P. 599.



down the whole way from the foot of the upper dam ; the same to be used for any purpose whatsoever," with the reservation that nothing driven by water-power was to be erected on the premises conveyed, without the consent of *Alexander McLaren*, to whom such water-power had previously been conveyed.

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If the conveyance to *Baines* embraced the bed of the river to the middle thread of the stream, *John Murphy* conveyed to *Hugh Boulton* that which he had previously conveyed to *Baines*. This subsequent conveyance could not, of course, affect any title already acquired by *Baines*, if he had acquired any ; and I will assume for the present that by the conveyance to *Baines* he acquired title in the bed of the stream, and that the defendant has acquired the like title in that part of the bed of the stream where he has constructed the works which are complained of.

It is now established by the highest authority in England that a riparian proprietor is not entitled to construct works in the bed of a stream, such river bed being owned by himself, which may cause injury to another riparian proprietor ; not only may he not construct works which it is shewn will have that effect ; but he may not construct works which may have that effect.

Judgment.

This doctrine was established in the well known case of *Bicket v. Morris* (a), in the House of Lords. I quoted at some length from the judgments in the House of Lords, in a case that was before me of *Kirchoffer v. Stanbury* (b) ; and in the same case I referred to other authorities upon the same point. I now refer to my quotations in that case instead of repeating them. The question has been also elaborately discussed since in a case in Scotland, *Robertson v. Foote* (c).

(a) L. R. 1 Sc. App. 47

(b) 25 Gr. 420.

(c) Court of Ses. Cases, 4th Series, 1210.

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To apply this doctrine to the works in question constructed by the defendant. The natural flow of the stream below as well as above the mill dam is, as appears by the evidence, more towards the north side of the river—the defendant's side—than towards the south side. It is therefore particularly important to the plaintiff, who has a factory driven by water power on the south side, that none of the water which, in its natural flow, would come down his side of the river should be diverted from it.

Judgment.

The evidence of some of the witnesses is, that the works in question have not that effect; the evidence of others is, that the effect in that direction, if any, is very slight; but the weight of the evidence certainly is, that if the wing dam were continued up the stream it would, or at any rate it might, have that effect; and the inference from what had been done, and from what was being done, shortly before the filing of the bill was, in the minds of witnesses well qualified to judge, that it was a work in course of construction intended to be carried further up the river, (how far up did not appear,) but that the further it was carried up the stream the greater was its tendency to divert the water to the north side of the river. Below the wing dam is a wall just below the railway bridge which crosses the river; and below that again is a cutting through the rock marked on a map of the defendant's "canal," and forming an Island the south side of which was the natural bank of the river on the north side. The inference in the minds of these witnesses is, that these works have been constructed by the defendant with a view to the supply of water to a mill or other machinery to be built east of the bridge.

One strong point is, that no good reason is suggested for the construction of this wing dam and other works, unless it be, by artificial means, to divert some water to the north side of the river which, in its natural flow, would not go there. The reason given by the defen-

dant, that it was to preserve his bank from the action of the water, is regarded by the witnesses, in view of the fact that the bank is rock, as not the true reason.

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In my judgment, the plaintiffs' case is brought by the evidence within the case of *Bicket v. Morris (a)*, and the other cases of that class to which I have adverted.

The defendant makes a point against the plaintiffs being entitled to a decree, out of the circumstance of the plaintiff having built a wing dam running up the stream from the west side of the most southern pier of the railway bridge to a few feet—ten or fifteen feet—above the division line between the two lots, as would appear on a map of the defendant's, and having made a temporary dam from the head of this wing dam in an oblique direction up the river to the north bank; this temporary dam having been placed where it was on two occasions when the water was very low. The placing the wing dam may have been strictly within his rights, under his conveyance from *Boulton*, and I apprehend that it was so. It appears on the defendant's map as not extending as far north as the middle thread of the stream, and extending westward very much less than the 153 feet on lot 14, granted to him by *Hugh Boulton*. So also the carrying out of the temporary dam would be within his rights under the same grant, if it had not the effect of interfering with the riparian rights previously granted to *McLaren*, and it is not shewn what its effect in that respect was.

Judgment.

The object no doubt was to draw waters to the south side that would in their natural flow have gone to the north side, and I infer that it had that effect; but it is not shewn that it did not leave sufficient water flowing to the north side for all ordinary purposes; and the point where it touched the north side of the river, was below the mill on that side, so that it caused no practical interference with the exercise of any riparian right.

It may be assumed that the plaintiff had not in

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 v.  
 Gillies.

strictness a right to do this, but even so, I cannot see that his having done it is a reason for denying him relief if he establishes a title to relief. It does not fall within the rule of relief being denied to a plaintiff not coming into Court with clean hands. Nor is it upon the answer and evidence a proper case for active relief in this suit to the defendant, but rather a case in which, under General Order 126, the defendant may properly be put to institute a suit on his own behalf.

Judgment.

The plaintiffs are entitled to an injunction in the terms of the first branch of the prayer of the bill. The injury or prospective injury to the plaintiffs pointed at by the bill arises from the defendant's works of construction and excavation west of the railway bridge. That may be obviated by the removal of the said structures and filling up of the excavations west of the bridge, or more easily and inexpensively by a wall from the most westerly point of the wing-dam to the north bank of the river. The plaintiffs in the 10th paragraph of the bill state that the defendant after being served with a notice by them to desist from his work, did construct a dam from the one of these points to the other; and that the effect of it was to restore the flow of the waters of the river substantially to the ordinary course in which they had flowed before the construction of the defendant's works. The wall should be a solid stone one, and should be made and kept water tight. This would answer the justice of the case. It is indeed the extension of the dam in 1879, and its apprehended further extension up the stream, that has been the cause of the trouble between the parties. What was done in 1874 in the way of excavation and masonry does not seem to have been complained of.

The decree will be with costs.

I may mention that the examination of this case has cost me much more time and trouble from the absence of at least one map, I think two, by reference to which the witnesses were examined, than otherwise it would have done.

## RE TRUSTS OF JOHN McDONALD'S WILL.

1881.

*Will, construction of—Mortmain—Costs—Next of kin—Heirs-at-law.*

Three weeks before the testator died he made his will, whereby he directed his lands to be sold, and out of the proceeds gave \$2,000 to his widow in lieu of dower and further directed that "all moneys then remaining in the hands of my executors shall be divided between the following funds," naming five different charities in connection with the Canada Presbyterian Church—such "money to be divided in whichever way my executors may think best."

*Held*, that the bequests to the charities were void under the Mortmain Acts; and there being no residuary clause the bequests so failing to take effect went to the heirs-at-law, not to the next of kin of the testator: costs of all parties to be paid out of the estate.

This was an application by petition of the trustees appointed under the will of one *John McDonald*, of the county of Middlesex, deceased, to obtain the advice of the Court in the distribution of the estate of the testator, under the circumstances stated in the judgment.

Mr. *Fraser* (London), for the trustees.

Mr. *W. Roaf*, for the widow.

Mr. *W. Mortimer Clark*, for charitable institutions.

Mr. *R. Meredith*, for the other legatees.

PROUDFOOT, V. C.—The testator in his will directed March 11th. his lands to be sold, and after giving \$2000 to his wife, in lieu of dower, and some legacies, he then proceeded: "And all moneys then remaining in the hands of my executors shall be divided between the follow- Judgment. ing funds in connection with the Canadian Presbyterian Church, viz., Foreign and Home Mission Funds, Aged and Infirm Ministers' Fund, French Canadian Mission, and British and Foreign Bible Society. I will money to be divided in whichever way my executors may think best." The will was made on the first day of August 1879, and the testator died on the 20th of the same month.

1881. These bequests are clearly void under the Mortmain Acts: *Whitby v. Liscombe* (a). The case of *Lucas v. Jones* (b) is not at variance with this; the expression of *Wood*, V.C., as to conversion, referring to a conversion by the will of an original testator, and a gift of the converted fund by the will of the legatee.

Re Trusts of  
John Mc-  
Donald's  
Will.

The principal difficulty in the case is to determine whether the bequest that has failed to take effect under the Mortmain Law, passes to the heir-at-law or to the next of kin. There is no residuary legatee in this case, other than the charities, for the charitable bequest is in the nature of a residuary bequest.

If the question had been between the heir and the residuary legatee as to land converted and ineffectually given to a charity, *Whitby v. Liscombe*, following a long line of English authority, determines in favour of the residuary legatee. But the English cases are quite as conclusive that where there is no residuary bequest, and no valid gift over, the estate descends to the heirs-at-law: *Tudor's Charitable Trusts* 91; *Shelford* on Mortmain, 284. And it seems that the devise of the legal estate would have been void under the Statute if charities only were concerned in the proceeds. But where there are other trusts not liable to objection the devise will be supported, and the heirs will take a resulting trust in that part which has not been legally disposed of.

Judgment.

With regard to the land, which is not to be sold till after the wife's death, and the proceeds of which are "to be equally divided between the legatees within mentioned," I think the same conclusion must be arrived at. The legatees named include the charities, and, as far as they are concerned, the bequest is void. But I think they must be looked on as one single object, and the share that would have passed to them results to the heirs-at-law.

The costs of all parties will come out of the estate.

(a) 22 Gr. 203.

(b) L. R. 4 Eq. 73

1881.

## ARTLEY v. CURRY.

*Boundaries—Original monuments—Surveys.*

In questions relating to boundaries and descriptions of lands, the well-established rule is, that the work on the ground governs; and it is only where the site of a monument on the ground is incapable of ascertainment that a surveyor is authorized to apportion the quantities lying between two defined or known boundaries. Therefore, where an original monument or post was planted as indicating that the north-west angle of a lot was situated at a distance of half a chain south therefrom, and another surveyor had actually planted a post at the spot so indicated, and subsequently two surveyors, in total disregard of the two posts so planted, both of which were easy of ascertainment, made a survey of the locality and placed the post at a different spot, the Court [SPRAGGE, C.] disregarded the survey, and declared the north-west angle of the lot to be as indicated by the first mentioned monument.

On the 25th of September, 1880, *John Artley* filed his bill of complaint against *Nathaniel Curry*, wherein he alleged, that prior to, and on the 15th day of April, 1869 the defendant *Nathaniel Curry* was the owner in fee simple of lot No. 24, in the 11th concession of the township of Euphrasia; that prior to the date of the deed mentioned in the next succeeding paragraph, the defendant agreed with one *Christopher Sparling* to sell, and the latter agreed to purchase twenty acres of the said lot, which he described; and in pursuance of such agreement, and for valuable consideration by deed, dated the 15th day of April, 1869, the defendant purported and intended to convey the said twenty acres to the said *Christopher Sparling*: that by indenture dated the 1st day of April, 1879, the said *Sparling* mortgaged to the Provincial Permanent Building Society the said twenty acres, and default having been made in payment, the said company, pursuant to the powers given them under such mortgage, sold, and by deed dated the 23rd day of January, 1877, conveyed the said twenty acres to the plaintiff; that in the mortgage and deed last before mentioned, the said

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twenty acres were described as in the third paragraph of said bill, which description all the parties to the said instruments believed accurately described the twenty acres above referred to ; that in or about the year 1879, some interested persons alleging that the line between the 11th and 12th concessions of the said township had not been correctly run, caused a new survey to be made, which placed the said line and western boundary of the said lot 24 about 11 rods further west than was previously believed to be its western boundary ; that the twenty acres mentioned in the first paragraph of said bill were in the possession and actual occupation and enjoyment of the said *Sparling*, from some time prior to the date of the said conveyance to him, until in or about the month of November, 1872, when the said company took possession of the same under the said mortgage and retained such possession until the said lands were conveyed by them to the plaintiff as aforesaid ; that the plaintiff had ever since the conveyance of the said twenty acres to him as aforesaid been in the actual enjoyment, occupation and possession of the said twenty acres, and had made great improvements on the same, and he and the said *Sparling* during such term of occupation made great improvements thereon ; and the plaintiff charged that the fact was, that he and those through whom he claimed the said twenty acres had been in the continuous possession thereof for more than ten years before the acts of the defendant in the said bill mentioned, and he claimed the benefit of the Statutes of Limitations then or at any time in force in this Province.

Statement.

The bill further stated that the defendant claimed that the beginning of the twenty acres conveyed by him to the said *Sparling* was at the north-west corner of the said lot, according to the said new survey, and that the eastern boundary of the said twenty acres was 11 rods or thereabouts further west than the eastern



boundary of the twenty acres occupied and enjoyed by the said *Sparling*, and those claiming under him; that in or about the month of January, 1880, the defendant without the consent of the plaintiffs took down and removed the fence on the eastern boundary of the said twenty acres occupied by the plaintiff as aforesaid, and dividing the said twenty acres from that part of said lot owned by the defendant, without giving notice to the plaintiff of the defendant's intention so to do, whereby divers cattle, as well of the defendant, as of other persons then being on the said land of the defendant, escaped out of the said land of the defendant into the said land of the plaintiff, and trod down, consumed and spoiled the grass and herbage of the said last mentioned land.

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The bill further stated, that afterwards the defendant trespassed upon the said twenty acres, so occupied by the plaintiff, by entering upon and erecting a fence thereon, commencing at a point 11 rods or thereabout west of and running parallel to the eastern boundary of the said twenty acres until it intersected the western boundary of same; that the defendant about the same time assumed to take possession of that portion of the twenty acres, formerly occupied by the plaintiff as aforesaid, that lies between the said last mentioned fence and the said eastern boundary, and had ever since endeavored to hinder the plaintiff in his possession thereof, and had forcibly and against the plaintiff's will taken and received to his own use all the issues and profits, and the beneficial use and occupation of said portion of the said twenty acres, whereby the plaintiff had during all that time lost and been deprived of the issues and profits, and the beneficial use and occupation thereof; and the plaintiff submitted that the description contained in the said deeds and mortgage truly described the twenty acres so possessed, occupied and enjoyed by him, and that in the event of the Court deciding that the said twenty acres were not

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truly described by the said deed and mortgage, then the plaintiff submitted that the said twenty acres had been by mere error in survey erroneously described in the said deeds and mortgage, the description therein being incorrect only so far as the metes and bounds of the said twenty acres were concerned ; and the plaintiff further charged that the fact was, that the said twenty acres of which the plaintiff had until the acts aforesaid been in possession, were at the time of the sale thereof by the defendant to the said *Sparling* pointed out to him by the defendant, and were clearly shewn upon the ground, and it was the intention and understanding of all parties that the said parcel so pointed out and shewn on the ground was the portion of the said lot 24 purchased by the said *Sparling* ; and the plaintiff submitted that the defendant was estopped and prevented from setting up the alleged charge by reason of said survey.

Statement.

The bill further set forth that if the plaintiff was deprived of the said strip to the east, the most valuable of his improvements would be taken away, and the rest of his twenty acres much reduced in value ; and the plaintiff claimed the benefit of all the Statutes of Limitations then, or at any time in force in this province, as a bar to the alleged right of the defendant. The prayer of the bill was, that the defendant might be restrained from trespassing upon the plaintiff's lands above set forth, and from other acts of a like nature, and might account for the use and occupation of the said lands, and for other damage accrued to the plaintiff by the removal of the said fence. And further, if the Court should be of opinion that the twenty acres occupied by the plaintiff were not correctly described by the said deeds and mortgage then, that the said deeds and mortgage might be rectified by correcting the description of the lands therein referred to, so as to make the same conformable to the true agreement between the parties : that the defendant might be

ordered forthwith to deliver up to the plaintiff the possession of that portion of the said twenty acres, of which he had deprived the plaintiff; and for necessary directions and accounts; and costs. 1881.

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The defendant by his answer admitted the sale of twenty acres of the said lot to the said *Christopher Sparling*, and that a conveyance was made to the said *Sparling* with the description of the said twenty acres as set forth in the bill; the making of the mortgage and the conveyance to the plaintiff in the said bill also mentioned; and alleged that what was intended to be sold and conveyed, was twenty acres of the north-west corner of the said lot; that there was, as defendant was informed, a provisional stake set at the time, at the point where the plaintiff claimed the north-west corner of said lot to be, but the correct boundary of the said lot at its north-west corner was in the original survey fixed at a point about 11 rods to the west of the said alleged old provisional stake; that the said old provisional stake had long since disappeared, and was not regarded as indicating the real boundary and point of commencement at the north-west corner of said lot, when defendant sold, or when the plaintiff bought the said land; that the correct position of the said stake and of the true boundary and point of commencement for the north-west corner of the said lot, was known by the parties to this suit and others in the neighborhood long before the time mentioned in the bill, and was well known to the plaintiff before he bought the said land; and the defendant denied that the plaintiff had in any way acquired title to the piece of land now in dispute by virtue of length of possession in him and others under whom he claimed, or that the plaintiff had made improvements, for which he was entitled to any compensation, on the said strip of land in dispute, and the defendant alleged that the plaintiff before he bought the said twenty acres well knew that the boundary line and point of commencement of the

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north-west corner of the lot was as the defendant claimed it to be, and as it really was according to the original survey; that the fence, with which the plaintiff claimed the defendant interfered was blown down by the wind, and thereupon some cattle strayed into the plaintiff's premises, because he refused to allow defendant to put up the fence, or contribute towards the expense of a survey, and that defendant had the fence rebuilt, where it then was, under the supervision and according to the award of the fence viewers in that behalf constituted; and the defendant claimed to be allowed to hold the said fence as indicating the true boundary between his land and the said twenty acres. The defendant also denied that there was any pointing out upon the ground of any particular twenty acres, when the defendant sold the same, and alleged that the defendant was not estopped for any reason from shewing the truth as to the precise position and locality of the same, and if for any reason it should appear that the plaintiff was entitled to claim the said strip of land of 11 rods or thereabout in width to the east of the then present boundary fence between defendant and him, then the defendant prayed that it might be declared that he was entitled to the possession and ownership of the strip of land between the said provisional stake and the correct position of the stake at the north-west corner of the said lot.

Statement.

The cause came on for the examination of witnesses and hearing at the Sittings of the Court at Owen Sound, in the Autumn of 1880.

Mr. *Pollard*, for the plaintiffs.

Mr. *Bain*, for the defendants.

The facts, in addition to those set forth in the pleadings, appear in the judgment.

SPRAGGE, C.—A principal question between these parties is, what is the north-west angle of lot 24, in the 11th concession of Euphrasia. A post was planted by *Thomas Donovan*, a surveyor, two rods (half a chain), south of a post, which he took to be an original post planted by *Charles Rankin*, the surveyor by whom the township was surveyed, under the instruction of the Government. I think it is sufficiently made out by the evidence that the post taken by *Donovan* to be an original post was in fact an original post planted by *Rankin*, in the place where it was found by *Donovan*, and where the remains of it were found at a later survey, made by another surveyor, *Arthur G. Sing*. It is made a question for what purpose it was planted, and to mark what, and whether it was planted definitively as a monument to mark anything.

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We are fortunate in having the evidence of Mr. *Rankin* himself, and in having his field notes made on his survey of the township, in 1836. *Rankin* was advanced in years, eighty years of age, when his evidence was taken; and, while his answers to the questions put to him indicate some failure in mental vigour, and some failure in memory also, they shew that he was still sufficiently possessed of the subject of inquiry, both in the way of understanding and memory, to make his evidence of considerable value, and, taken with his field notes, to make it the most important evidence in the case. In estimating the value of his evidence, it is to be borne in mind, that the subject upon which his evidence was given was the business of his life; and the survey of a township, an important event. Upon some points he should not have been questioned, such as what he would consider to be fair and proper, and what he considered to be the law in relation to surveys. Discarding these as irrelevant, what remains is pertinent and of value.

Judgment.

The field notes produced are of his survey, along a portion of the allowance for road between lots 24 and

1881. 25, in the 9th, 10th, 11th, and 12th concessions, the lots being numbered from east to west, and the length given by him to each lot being 67 chains and 30 links. The field notes describe the character of the soil, and the description of trees and other particulars along the route; and at the end of the note applying to each concession is the word "post" preceded in each case by the words "67 chains 30 links." The posts were planted in the centre of the allowance for road, each post indicating the east end of one lot, and the west end of the other. I do not see what other conclusion can be drawn from the field notes, and the evidence of Mr. *Rankin*, than that the posts were planted in order to mark a spot in the centre of the allowance for road opposite the eastern and western ends of lots. I say nothing about concession lines as there is no concession line, but what is called a blind line, between the 11th and 12th concessions.

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v.  
Curry.

Judgment.

It appears then that *Rankin* did plant a post at a measured distance of 67 chains and 30 links west of the post last planted on the same line on the east; and that it is the post referred to in the evidence of *Donovan* and *Sing*; the same post in the same place. The point of locality might have been probably made more certain, if evidence had been given of the position of a creek described in that part of the field notes, which describes the ground along the 11th concession.

A question is made as to whether the post in question was planted definitively as a monument, or merely as a picket subject to correction, and several questions upon that point were put to Mr. *Rankin*. He said that in some instances in making this survey, where they found concessions not exactly parallel, they sent back and altered the stakes to equalize the two concessions. He does not say this of the stake in question or its position; and in his field notes he does not call it a picket but a post. A post so planted I understand to be a monument, constituting what is called work on the ground.

The position of that post was ascertained by *Donovan*, and the north-west corner of lot 24 in the 11th concession would necessarily be half a chain south of it, and *Donovan* planted his post half a chain south of it.

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The rule is well established, that it is the work on the ground that governs, and it is only where the site of a monument on the ground is incapable of ascertainment, that a surveyor is authorized to apportion quantities between known boundaries.

Two surveyors, *Garden* and *Cousins*, took upon themselves to do this. *Garden* says he took no evidence as to the position of the *Rankin* stake, that he was told that it was knocked down long before. *Cousins* says he found *Donovan's* line wrong, and discarded it altogether, that he could obtain no positive information as to the site of the *Rankin* post, and added, strangely enough, that it would have made no difference if he had.

The short point after all is, whether the site of the *Rankin* post was ascertained. If it was, and if *Donovan's* post was planted half a chain south of it, that post marked the true north-west angle of lot 24, in the 11th concession, and the plaintiff is entitled to a decree. In my judgment the proper conclusion from the evidence is, that the plaintiff's contention is right upon both these points.

Judgment.

I may notice a circumstance that appears in the evidence, that it was always understood in the neighborhood that lot 24 in the 12th concession over-ran in quantity; the same does not appear to have been said of lot 24, in the 11th concession. If the *Rankin* post was planted where upon the evidence of *Donovan* and *Sing* it was planted, lot 24 in the 12th concession, would in length over-run considerably. It is not, perhaps, very material, but still it does shew the tradition in the neighborhood in favour of the *Rankin* post being where the plaintiff contends it was.

1881. The plaintiff has sustained some damage by acts of the defendant in assertion of his claim, which may be taken at \$20.

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v.  
Curry.

The plaintiff is entitled to have it declared that the site of the post planted by *Thomas Donovan*, D. P. S., is the true north-west angle of lot 24, in the 11th concession of Euphrasia, and to the injunction prayed for, and to \$20 damages.

Judgment.

The plaintiff succeeding upon this point, it is unnecessary to consider the other questions raised in the case. The decree will be with costs.

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### CAMPBELL V. CAMPBELL.

*Pleading—Demurrer—Alimony—Fraudulent conveyance.*

The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and that for that purpose her husband fraudulently conveyed all his lands to the co-defendant, and the bill prayed to have such conveyance declared fraudulent. The grantee in the impeached conveyance demurred for multifariousness, for want of equity, and want of parties. The Court, [BOYD, C.,] over-ruled the demurrer on the first two grounds, but allowed the demurrer for want of parties; the plaintiff not having recovered judgment and execution could only sue in a representative capacity—that is on behalf of herself and all other creditors. *Longeway v. Mitchell*, ante vol. xvii, p. 190; *Turner v. Smith*, ante vol. xxvi, p. 198; *Culver v. Swayze*, *Ib.* 395, and *Morphy v. Wilson*, ante vol. xxvii, p. 1, considered and followed.

This was a suit for alimony instituted by the plaintiff against her husband the defendant *Archibold Campbell* in which she joined one *Donald Campbell*, a brother-in-law of her husband, for the purpose of impeaching a conveyance executed by her husband to the defendant *Donald*, the object of which the bill alleged



was to defeat the plaintiff in her attempt to compel payment of alimony in case the same were decreed. 1881.

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v.  
Campbell.

The bill, amongst other statements, alleged that

(10) The defendants entered into a conspiracy for the purpose and with the object of enabling the defendant *Archibold Campbell* to hinder, defeat, and delay your complainant in recovering from her husband, the said defendant, *Archibold Campbell*, a decree for alimony and her support and maintenance; and for that purpose and with that object in view the defendant *Archibold Campbell*, by deed bearing date the 20th day of July, 1881, pretended to grant and convey the lands particularly mentioned in the ninth paragraph hereof to his co-defendant the said *Donald Campbell*, who is a brother-in-law of the defendant *Archibold Campbell*, for the pretended consideration of \$1500, which said deed was duly executed and registered in the Registry Office for the City of London, being the proper Registry Office in that behalf, on the 21st day of July, 1881.

(14) The defendants threaten and intend to sell and dispose of the lands hereinbefore particularly described and the goods and chattels hereinbefore mentioned to a *bonâ fide* purchaser for value; and your complainant is apprehensive that, unless restrained by the order and injunction of this honourable Court, the said defendants will so sell and dispose of the said lands and goods to a *bonâ fide* purchaser for value, thereby enabling the defendants to defeat or hinder your complainant's claim to alimony and her support and maintenance from the defendant *Archibold Campbell*.

Statement.

(17) The defendant *Archibold Campbell*, though he has no property other than the lands and property hereinbefore mentioned and described, is a carpenter by trade, and by means of his labour at his said trade is enabled to earn large wages, whereby the defendant is able to support and maintain your complainant and his family in a suitable and proper manner."

The defendant *Donald Campbell* demurred for want of equity and want of parties, and also on the ground that the bill was multifarious.

Mr. *R. Meredith*, in support of the demurrer.

Mr. *Isaac Campbell*, contra.

BOYD, C.—This case has not been so fully argued as Oct. 29.  
I could have wished. The bill was filed on the 27th of July last, so that according to rule 494, I do not think

1881. the Judicature Act applies, or that if it did apply, it could afford much assistance to the plaintiff. There are two lines of antagonistic decisions in this Court; the one may be represented by *Whiting v. Lawrason* (a), the other by *Longeway v. Mitchell* (b). The latter has been followed and recognized as the present law of the Court in *Turner v. Smith* (c), *Culver v. Swayze* (d) and *Morphy v. Wilson* (e). The principle of these decisions applies to the present case. The wife filing her bill for alimony is not technically a creditor, although the demurrer puts it in this way, and though the Legislature has in some measure attributed that character to her by permitting a writ of arrest to issue at her instance in certain cases, (R. S. O. ch. 40, sec. 45.) But the Statute of 13 Eliz. ch. 5, is for the avoidance of conveyances which are made to "delay, hinder, or defraud creditors or others, of their just and lawful actions, suits, and reliefs," and it is to be expounded beneficially to suppress fraud: *May*, pp. 147-8, and cases cited. All the forcible reasoning of *Strong, V. C.*, in 17 Grant, applies to the state of facts disclosed in the bill in the present case, where it is alleged, and by the demurrer admitted, that there was a conspiracy between the defendants so to deal with the husband's land as to prevent the wife from recovering any alimony. The pleading is not very artistic, but this is the substance of the 10th, 14th, and 17th paragraphs when read together. My duty is to follow the late decisions, and let the defendant carry the case further, if he is dissatisfied.

Judgment.

The later cases do by no means conflict with *Abel v. Morrison* (f), as explained by *Hepburn v. Patton* (g). Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at

(a) 7 Gr. 603.

(c) 26 Gr. 198.

(e) 27 Gr. 1.

(g) 26 Gr. 597.

(b) 17 Gr. 190.

(d) 26 Gr. 395.

(f) 23 Gr. 109.

the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property, (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of judgment for the amount claimed.

The demurrers for multifariousness and want of equity are over-ruled; but the demurrer for want of parties is allowed, as the plaintiff, not having judgment and execution, is not competent to sue except in a representative capacity. Leave to amend, without costs.

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v.
Campbell.

Judgment.

1881.

GRANT V. CANADA LIFE ASSURANCE COMPANY.

Mortgage, &c.—Power of sale—Notice of sale.

One of the stipulations of a mortgage was, that “interest should be payable half yearly on * * * Provided that the mortgagees, on default of payment for three months, may enter on and lease or sell the said lands without notice : And the mortgagees covenant with the mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month’s notice in writing shall have been given to the mortgagors.”

Held [*per* PROUDFOOT, V.C.], that the mortgagees could sell at any time, without notice, after default for three months, and that the purchaser would take a good title ; and in any event, a notice served at any time after default was sufficient, and the mortgagees were not bound to wait until default had been made for three months to give such notice : in other words, that the month’s notice and the three months’ default might be concurrent.

This was a suit instituted by the plaintiff against *The Canada Life Assurance Company*, one *Horace Thorne*, and the husband of the plaintiff, seeking to set aside a sale of certain lands in the city of Toronto on the ground of want of notice according to what was claimed to be the clear arrangement between the parties, and the stipulation of the mortgage deed, which was as follows :

Statement. “Interest payable half-yearly on * * * Provided that the mortgagees, on default of payment for three months, may enter on and lease or sell the said lands without notice. And the mortgagees covenant with the Mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month’s notice in writing shall have been given to the mortgagors.”

Default had been made in payment of the interest for two months, whereupon the solicitors of the defendant company enclosed a notice to the husband of the plaintiff for the purpose of being served on her, at the same time writing to the effect that, “you being

three months in arrear," they gave the notice required by the condition to be served.

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Assurance
Co.

Mr. *A. Hoskin*, Q.C., for the plaintiff.

Mr. *McCarthy*, Q.C., and Mr. *Bruce*, for the defendant company.

Mr. *Hall*, for the defendant *Thorne*.

Mr. *Donovan*, for the defendant *Grant*.

The defendant *Grant* was called as a witness, and swore that the only objection to the proceedings of the mortgagees was, the want of sufficient notice of sale after the three months' default. When it was suggested that no notice whatever need have been given, and that the plaintiff's only remedy would have been an action for damages; and that a notice given after default of payment for any time was all that was requisite, provided that an actual default of payment took place for three months before a sale was effected; the witness then said, "in that case the stipulation in the instrument only served as a pitfall to the unwary."

At the conclusion of the case,

PROUDFOOT, V. C., before whom it came on to be heard, at the Sittings at Toronto, in the Spring of 1881, dismissed the plaintiff's bill with costs, observing that what was contended for by the plaintiff was, that the mortgagees could not sell until a default had occurred for four months, which, however, was not the case, as the notice might be given at any time after default, provided no sale was effected until after the expiration of one month from the service of the notice on the mortgagor. In any event, that the purchaser took a good title, and the only redress of the mortgagor was under the covenant. Judgment.

1881.

RE DUNHAM, PETITIONER.

Quieting Titles' Act—Assent to devise implied—Statute of Limitations.

A., in 1835, went into possession of land upon the invitation of *P.*, who promised to give him a deed but subsequently refused to do so. *A.* thereupon determined to remain upon, and succeeded in making a living from the land. *P.* died three years afterwards, having devised the land to *A.* and his wife for their joint lives, with remainder to *J.*, one of the contestants. *A.* occupied the land until 1877, when he executed a conveyance thereof in fee to the petitioner.

Held, on appeal, [affirming the decision of the Referee of Titles allowing the claim of the contestants], that *A.* by his entry had become tenant at sufferance to *P.*, and that as *A.* was aware of the devise to himself, and never did any act shewing a determination not to take the estate so given to him, the estate for life had vested in him, and that he or his grantee could not claim the fee by virtue of *A.*'s possession.

Some thirty years after *A.*'s entry he granted part of the land to one *B.*, and *J.* joined in the conveyance :

Held, a sufficient admission of the title of *J.* as a remainderman, and so an admission that the will was operative on the land ; *J.* having no claim to the land otherwise than under the will.

Statement.

The land in question in this matter was granted by the Crown, in 1807, to one *Colonel Augustus Boiton*, who it appeared had placed *Michael Saigeon* in possession, but no conveyance was shewn to have been executed by *Boiton* to him. *Saigeon*, however, in 1828, after having retained possession for several years, executed a conveyance of the premises to one *Philip Phillips* in fee.

About seven years thereafter, *Phillips*, it was shewn, had requested his son-in-law, one *Lewis Arnold*, to come and live with him on the lot, promising if he did so to give him a deed of the place. *Arnold*, acting upon such invitation of *Phillips*, in 1835, entered into possession of the premises, and occupied them either by himself or his tenants until he conveyed them to the petitioner in April, 1877. *Phillips*, it was shewn, died in 1838, having first made a will by which he devised

the lands in question to *Ann Catherine Arnold* and her husband (*L. Arnold*) during their natural lives or the life of the survivor of them, for their use and support, and after their decease to any child or children his said daughter might have; but should she die without children, then after the decease of *Arnold* and his wife the testator gave the property to his adopted son *Isaac J. C. L. Phillips*, in fee. It further appeared that Mr. and Mrs. *Arnold* resided on the premises until her death, without issue, in 1870.

1881.
Re *Dunham*.

The evidence taken before the Referee shewed that the will of *Phillips* was read over in the presence of *Arnold*, and that he did not then, or at any time afterwards, disclaim the estate or interest devised to him, until he attempted to convey the property to the petitioner in April, 1877, as above stated.

The question, therefore, which arose in the matter was simply whether the petitioner was at liberty to repudiate the devise by *Phillips* and assert title under *Arnold*, whose possession had commenced anterior to the making of the will, and had continued ever since, so as to destroy the title of the devisee in remainder—one of the contestants in the matter.

Statement.

On the matter coming before the Referee, Mr. *Holmsted*, that officer decided in favour of the right of the contestant, observing—after disposing of an objection as to the due execution of the will not material to the present question—

“No doubt it is a clear and settled principle of law that you cannot, as *Ventris, J.*, forcibly puts it, ‘put an estate into a man in spite of his teeth.’ (a) At the same time I take it to be equally well settled that the law will presume that every estate, whether given by will or otherwise, is for the benefit of the person to whom it is given and therefore, until the contrary is shewn, will assume an agreement to the devise or conveyance. (b) Where an estate is devised or conveyed to a man, therefore, the law will presume that he accepts it, unless he by some plain and unequivocal act disclaims the estate pur-

(a) *Thompson v. Leach*, 2 Vent. 198.

(b) *Byth. Conv.* 698.

1881. ported to be devised or conveyed to him. In the present case there is not a particle of evidence of any such disclaimer, either by word or deed, until thirty-nine years after the death of the testator, although the contents of the will were well known to the devisee at or shortly after the testator's death. After holding all that series of years in accordance with the will it is, I think, impossible for him or any one claiming under him now to repudiate it, in order to defeat the rights of those in remainder. (See per *Kelly*, C. B., *Bence v. Gilpin*. L. R. 3 Ex. 76.) The case of *Gray v. Richford*, 2 S. C. R. 431, appears to have conclusively established that where a person in possession of land without title acquires a legal title to possession, his possession thenceforward must be referred to the legal title and not to the mere possessory title. Applying that principle to the present case, it is clear that on the death of the testator the tenancy at will theretofore existing terminated, and thenceforth *Arnold* had no title to be in possession at all, except under the will. Under the will he was rightfully in possession as tenant for life, and his title to possession could not have been successfully impeached by any one. In short, the possession was in the rightful owner, and therefore the Statute of Limitations had no application. The case of *Doe Daymon v. Moore*, 9 Q. B. 555, was much relied on by the learned counsel for the petitioner, and I confess that I find it difficult to reconcile that case with the principles laid down in *Gray v. Richford*. In *Doe Dayman v. Moore*, the defendant had occupied the land for over thirty years as tenant at will to the testator, but the right of the testator had not been barred by the statute at the time of his death. By his death the tenancy at will terminated. He, however, left a will devising the land to the wife of the defendant for life. From the time of the testator's death the defendant had no title to possession except under the wife. His possession under the will was lawful apart from that it was unlawful; and yet he was held entitled to claim under the unlawful possession so as to defeat the devisee in remainder. It was said by Lord *Denman* in that case that the heir-at-law of the testator might have entered and put an end to the possession by the husband, but it would seem that the obvious answer to any action by the heir would have been that the defendant was in possession in right of his wife and it is hard to see upon what principle the rights of the remainderman could be defeated because the heir did not bring an action in which he was certain of defeat in order to compel the husband to say whether he would take under the will or not. Besides it is only in the event of an intestacy that the heir could claim, and in that case there was obviously no intestacy, so that there was really no one who could have disputed the right of the defendant to possession, because both the right and the possession were in him. Between *Dayman v. Moore* and the present case there are some obvious distinctions *e. g.*, there the devise was to the wife of the tenant in possession, here it is to both husband and wife. In *Dayman v. Moore* the statutory period

Re Dunham.

Statement.

of limitation had almost run out at the time the testator died, in 1881. the present case it had just begun to run. Assuming therefore that the legal presumption of acquiescence by the devisee can be controlled by considerations of this kind (which I do not think is clear) we find in *Dayman v. Moore* very cogent reasons why the devisee might be presumed not to have acquiesced in the devise, while in the present case we find equally cogent reasons for presuming that the devisee at the time of the testator's death must have assented to and accepted the devise. I have not dwelt upon the evidence as to the declarations made by *Arnold* to the effect that after his death *Isaac J. C. L. Phillips* was to get the property, nor yet upon the fact that *Arnold* joined with him in 1867, in conveying an acre of the lot, which acre, though not now in question, was held by *Arnold* under the same title. This transaction and the declarations referred to all took place more than twenty years after the death of the testator, and after the title of *Arnold* would have become absolute if he did not hold as tenant for life. In some cases evidence of this kind has been received to explain the nature of the prior possession, but it seems somewhat to trench on the statute which requires acknowledgments of title to be in writing, and also on those cases which decide that they must be made before the period of limitation has expired. In coming to the conclusion I have done, therefore, I have not thought it proper to rest any opinion as to the contestants' claim upon those facts. Although in my judgment the petitioner has failed to shew himself entitled to the fee, he would appear nevertheless, on complying with the requisitions I have made, to be entitled to a certificate of title as tenant for the life of *Lewis Arnold* of at all events a part of the land. It would not therefore be proper to dismiss his petition altogether. The claims of the contestants are allowed, and the petitioner must pay their costs of this matter." Re Dunham.

From this ruling of the Referee, the petitioner appealed.

Mr. *J. E. McDougall*, for the appeal.

Mr. *E. D. Armour*, contra.

PROUDFOOT, V.C.—I have read the evidence in this matter, and re-considered the able argument on behalf of the petitioner, but I think the Referee was right in holding that *Lewis Arnold* was only tenant for life, and that his deed to the petitioner passes no greater estate. Judgment.

1881. It is quite possible if Col. *Boiton* survived till the deed was made by *Saigeon* that his heirs might have asserted a title up till June or July, 1839. But *Phillips*, who claimed under *Saigeon*, was in possession till 1838, (for I think it clear that *Arnold* was tenant to *Phillips* during his life, and was possessing for *Phillips*.) and being so in possession, and before the lapse of the statutory period, had a transmissible and inheritable interest in the property, though it might be defeated at any moment by the entry of the rightful owner; and if *Arnold* succeeded to the possession claiming through *Phillips*, and retained possession till the expiration of that period, *Arnold* would have as good a right as if he had himself occupied for the whole period; *Darby*, 390. But if the estate he takes in succession is limited and defined by *Phillips* he could not by his possession acquire a larger estate, unless he were to hold for the statutory period after the expiration of the limited estate, a thing which

Ro Dunham.

Judgment.

could not happen in this case as the previous estate was for his own life.

I do not think that any contract, by *Phillips* to give the fee of the lot to *Arnold*, such as could be enforced in this Court, has been established. And when he refused to give *Arnold* a deed, *Arnold* did not remain in possession with any intention of becoming the owner; he only thought he could indemnify himself or make a living by the sale of the timber. He supposed *Phillips* to be the owner, and remained there by his sufferance.

The sole point for decision, it seems to me, therefore is, whether *Arnold* is to be deemed to have taken under the will of *Phillips*, or to have continued in possession in the exercise of an original trespass, beginning with the death of *Phillips*, when the tenancy expired. *Arnold* was aware of the devise to him and his wife shortly after *Phillips*' death, and never did any act shewing a determination not to take the

estate thus given to him until 1877, if the execution of the deed to *Dunham* is to have the effect ascribed to it. But that is not the necessary conclusion to be drawn from that act, for deeds now, though purporting to convey a fee, have no tortious operation, and will only pass the actual estate of the grantor. 1881.
Re *Dunham*.

Mr. *Cruise* says that all deeds, except feoffments, do, immediately upon their execution by the grantees, divest the estate out of the grantors, and put it in the party to whom the conveyance is made, though in his absence, and without his knowledge, till some disagreement to such estate appears: 4 Digest, 9, pl. 25. In the following paragraph he assigns several reasons for implying the assent of the grantee.

This rule is not confined to deeds, but is equally applicable to wills. In *Townson v. Tickell (a)*, a testator devised the reversion of certain premises to the plaintiff and one *Lock*, and appointed them executors of his will. *Lock* never assented to the will, and by deed disclaimed and renounced all the estates, trusts, powers, and authorities devised and created by the will. Judgment.

The Judges treat the law as clear that the estate vested in the devisee *primâ facie*, and the only question was as to the mode in which the refusal to accept was to be made, whether by deed or by matter of record. *Abbott*, C.J., says: "The law is certainly not so absurd as to force a man to take an estate against his will. *Primâ facie* any estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given. Of that, however, he is the best judge, and if it turns out that the party to whom the gift is made does not consider it beneficial the law will certainly, by some mode or other, allow him to renounce or refuse the gift." And he thought the renunciation by deed was sufficient, and had the

(a) 3 B. & Ald. 31.

1881. effect of making the devise with respect to him null and void. The other Judges concur in this view. *Re Dunham.* *Bayley, J.*, says: "The law, indeed, presumes that the estate devised will be beneficial to the devisee, and that he will accept of it, until there is proof to the contrary." *Holroyd, J.*, says: "A devise being *prima facie* for the devisee's benefit, he is supposed to assent to it, until he does some act to shew his dissent."

Arnold never did anything to shew his dissent till the deed to *Dunham*, in 1877, as I have already stated; but it is argued that to give effect to this implied assent he must be shewn to have been aware of his right, and that the evidence does not establish that he was aware of it. If that be necessary in such a case, which I do not at present think it is, the evidence does shew that he knew all that was necessary. The right he had in this view was that of a trespasser whose possession might ripen into a title by twenty years' continuance. *Arnold*, giving evidence in support of the petition, says that when *Phillips* refused him a deed he had at first a notion of leaving, but as there was plenty of timber on the place he could make out a living. When he heard of the will it did not alter his intention. He never paid any attention to the will. He did not know how long a possession would give a title. *He heard twenty-one years would give a title.* Knowing this he remains in possession, and takes no steps to shew that he was there claiming an independent right, and not under the will. Had he done so no doubt he would have been put out of possession very soon, and this affords a strong reason for implying an acquiescence in, and acceptance of, the devise.

Judgment.

As I have come to the conclusion that *Arnold* took under the will, it is not necessary to consider the case of *Doe Dayman v. Moore (a)*. In that case there was

no devise to the husband, and while he occupied the possession would be deemed to be his, and not that of his wife, the devisee for life. This, perhaps, is enough to distinguish it from the present case, though it is difficult to reconcile it with well known principles. Thus, in case of a purchase by a wife the husband, before the recent legislation on the subject of a married woman's right to make contracts, might disagree, and that would avoid the purchase. If he neither agreed nor disagreed the purchase was good, for his conduct would be deemed a tacit assent; yet the wife, after the husband's death, might disagree to and waive it; 4 *Cruise* Dig. 406, pl. 7. The decision of our Supreme Court, in *Gray v. Richford* (a), is in favour of the contestants.

But the case does not rest on an assent to be implied from *Arnold* not having done anything to disclaim. There is at least one positive act of his which seems to me to prove actively an assent to the will, and to his having taken under it. This was when he sold a part of the property to one *Burke* in 1867. The deed made to *Burke* was executed not only by *Arnold* and his wife, but by *Isaac C. Phillips*, the devisee in remainder after the life estate. The parties granted a quit claim to *Burke* of all their estate in the land. *Arnold* thus recognized that *Isaac* had a title or claim in the land. It is not pretended that he had this otherwise than under the will. It was an admission that the will was still operative on this land, though if the petitioner's present claim be well founded *Arnold* must by that time have had an estate in fee for eight or nine years. If he had thought he had a title by possession he would have refused to join *Isaac* with him in any such deed.

I have paid no attention to the evidence of admissions made by *Arnold* in conversation. This is a very

(a) 2 Sup. Ct. R. 431.

1881. ^{Re Dunham.} dangerous kind of proof to rely on. The witnesses may have meant to tell the truth, but they speak of casual talk taking place many years since, with no special reason for bearing it in mind.

I dismiss the appeal, with costs.

KASTNER v. BEADLE.

Right of way, obstruction of.

An arrangement made between the plaintiff and *B.*, whereby the latter "was allowed to go through" the plaintiff's land, was superseded by an arrangement whereby, in consideration of 150 cords of wood and the making of the road by *B.*, the latter was to have a right of way through the same land. The plaintiff was to erect and keep up the gate at one end, and *B.* was to keep up the gate at the other end of the road. The wood was delivered, and the road made, according to the terms of the agreement. The plaintiff subsequently erected three additional gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain the defendant from using the way except upon the terms of shutting those three gates when going through.

Held [reversing the decree of SPRAGGE, C.], that the right of way having been purchased when there were but two gates, the plaintiff had no right to fetter the enjoyment of the way by adding additional gates.

This was a suit seeking to restrain the defendant from using a lane across the farm of the plaintiff without closing and securing three certain gates erected across the same by the plaintiff. The cause was originally heard before *Spragge, C.*, at the sittings at Stratford, when, at the conclusion of the case, a decree was made declaring "that the defendant, in the exercise of his right of way over and along a lane one rod wide, on lot number twelve in the first concession of the township of Ellice, is not entitled to leave open or unclosed the gates or bars now placed by the plaintiff

across the said lane in continuation of the fences by him erected upon the said lot; that he is bound to close and fasten the same after use of the same for a reasonable time for the purpose of passing and re-passing by himself, his servants and family, and with his horses, waggons and other vehicles, in such manner as he finds the same closed and fastened respectively before opening the same for the purpose of passing through the same; the said plaintiff on his part to so construct and maintain such gates and bars, and the fastenings thereof, together with such appliances for keeping the said gates open during the necessary time for passing through the same, as may afford reasonable facilities to the defendant for such use thereof as aforesaid, and to the enjoyment of his said right of way. Decree the same accordingly."

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The defendant thereupon set the cause down to be re-heard, and the same came on for argument before *Blake* and *Proudfoot*, V.C.C.

The agreement under which the defendant claimed to be entitled to use the lane, was entered into about the year 1850 or 1851.

Mr. *Boyd*, Q.C., for plaintiff.

Mr. *Idington*, Q.C., for defendant.

Westgate v. Westgate (a), *Heward v. Jackson (b)*, *Kay v. Oxley (c)*, *Ramsden v. Dyson (d)*, *Craig v. Craig (e)*, were referred to.

The judgment of the Court was delivered by

BLAKE, V. C.—I have perused the evidence in this Feb. 17. case, much of which is very unsatisfactory. In the case of the plaintiff and defendant more particularly,

(a) 28 C. P. 283.

(b) 21 Gr. 263.

(c) L. R. 10 Q.B. 360.

(d) L. R. 1 H. L. 129.

(e) 2 App. R. 583.

1881. the statements made in their affidavits, filed on the motion for injunction and on their cross examination, differ very materially. The evidence which reads most satisfactorily is that of *Thomas E. Beadle* and *Joseph Beadle*. With the witnesses first mentioned, it is hard to say, without seeing them, whether the discrepancies arise from stupidity or untruthfulness. It seems however reasonably clear upon the evidence that in the first place an arrangement was made between the plaintiff and the *Beadles* whereby the latter "were allowed to go through" the land of the plaintiff. This no doubt was merely a license in their favor, revocable at the will of the plaintiff. It is equally clear that subsequent to this a defined bargain was made, whereby in consideration of 150 cords of wood, which the plaintiff was to get from the *Beadles*, and the making the road by them, they were to have a right of way over the plaintiff's lot. It is also reasonably clear that something then passed between the parties as to gates, and I think the fair conclusion from the evidence as it reads is that *Kastner* was to erect and keep up the Huron road gate, and the *Beadles* the gate at the rear of the lot. It is clear that the wood was supplied, and the contemplated work was done on the road. It was logged, cross-laid, ditched, gravelled, and culverts were put in. Taking into consideration the comparatively small value of land in those days it does not seem that the consideration given by the *Beadles* was inadequate to the privilege obtained by them. This then became a right of way appurtenant or appendant to the land in respect of which the *Beadles* demanded it. The defendant now only claims a right of way over this land free from hindrance. He does not claim the soil, nor does he seek to prevent the plaintiff exercising over it any rights which do not derogate from this user which he, the defendant, now insists upon. For value the *Beadles* then purchased this right. They have paid their purchase money and done as

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agreed in the way of making the road, and the defendant now stands, not as he at first did, dependent on the bounty of the plaintiff, but as one that has purchased a right demanding the fulfilment of the agreement made. The Chancellor in the note of his judgment says: "At the date of the agreement which we have heard a great deal of, there was one gate at each end, and three gates have been added since." I agree in this conclusion of fact, and am further of opinion that the *Beadles* having purchased the right of way when there were but the two gates, the seller has no right to fetter the enjoyment of the way by adding another gate. See cases cited in *Heward v. Jackson (a)*. If the lands held by the plaintiff could not be enjoyed without these gates, the Court might then conclude that the plaintiff intended to retain the power of placing additional gates along the lane, and the Court would go as far as possible to enable the plaintiff to exercise this right; but where that is not the case, I do not feel that we would be justified in casting the additional burden on this defendant demanded by this bill, and make his right of way of so much less value by the frequent interruptions in the lane which the plaintiff seeks to place.

I think there should be a declaration that the defendant is entitled to this right of way appurtenant to his lot: that he is bound to maintain the one gate and the plaintiff the other; and that the plaintiff is not entitled to obstruct this right by the present three or any other gates, and that the defendant should be paid his costs of suit.

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1881.

EXCHANGE BANK v. SPRINGER.

THE SAME v. BARNES.

Parties—Principal and surety—Non-joinder of principal.

One *M.*, and the defendants as his sureties, executed a bond conditioned for the good behaviour of *M.*, a clerk of the plaintiffs at Montreal. The bond was executed at Hamilton by the defendants who were resident there. *M.* made default at Montreal and absconded. Proceedings were taken against the sureties, without joining *M.*

Held, [affirming the order of *PROUDFOOT*, V. C.,] that the plaintiffs could not proceed against the sureties alone, if they required the joinder of the principal in order that they might have their remedy over against him.

Per *SPRAGGE*, C. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, coeval with the execution of the bond, which became a right of suit on the default of *M.*; and there was also an implied contract on the part of *M.*, upon execution of the bond, to repay to his sureties any money that they might have to pay by reason of his default.

Per *BLAKE*, V. C. The plaintiffs having filed their bill in Ontario, must be taken to admit that the Court has jurisdiction in respect of the matters therein embraced; and the practice of the court requiring it, and a method having been provided for service of process out of the jurisdiction, the plaintiffs were bound to follow the practice if the objection were taken.

Statement. This was a rehearing of an order of *Proudfoot*, V.C., directing the cause to stand over in order to add the principal in the transaction, one *Murray*, as a party, under the circumstances stated in the judgment.

Mr. *Bethune*, Q.C., and Mr. *E. G. Patterson*, for the plaintiffs.

Mr. *Boyd*, Q.C., and Mr. *McKelcan*, Q.C., for the defendant *Springer*.

Mr. *R. Martin*, Q.C., for the defendant *Barnes*.

In addition to the cases mentioned in the judgment, *Donohoe v. Wiley (a)*, *Great Australian Gold Mining Co. v. Martin (b)*, *Penn v. Lord Baltimore (c)*, *Miller v. Vickers (d)*, *Patterson v. Holland (e)*, *McDonald v. Reid (f)*, *Ex parte McPhail (g)*, *Tottenham v. Barry (h)*, *Mathæi v. Galitzin (i)*, *Ford v. Proudfoot (j)*, *Totten v. Douglas (k)*, *Scott v. The Royal Wax Candle Co. (l)*, *Biggs v. Penn (m)*, *McGiverin v. James (n)*, *Harris v. Fleming (o)*, *Wilson v. Rhodes (p)*, *Munro v. Munro (q)*, *Vaughan v. Weldon (r)*.

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SPRAGGE, C.—This bill is upon a bond executed by one *Murray* and the defendant; by *Murray* as principal and by the defendant as surety for the good behaviour of the principal, a clerk in the banking house of the plaintiffs in Montreal. The defendant was and is a resident of the city of Hamilton, and the bond was executed there; the clerk, the principal, was and is a resident of Montreal, and the default by him occurred in Montreal.

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There is no doubt of the right over of the surety against his principal, and that upon the facts alleged in the bill, such right had (assuming the facts alleged to be true) accrued; and there is no doubt, that as a general rule, the principal should be made a party to a bill against the surety, in order to his remedy over. But it is contended that the bond being for good conduct in Montreal, the default having occurred there, and the defendant residing there, takes this case out of the general rule.

(a) 43 U. C. R. 350.

(c) 2 Wh. & Tud. L. Ca. 923.

(e) 7 Gr. 563.

(g) L. R. 12 Chy. D. 632.

(i) L. R. 18 Eq. 340.

(k) 15 Gr. 126.

(m) 9 Jur. 368.

(o) L. R. 13 Chy. D. 208.

(q) 17 Gr. 205.

(b) L. R. 5 Chy. D. 1.

(d) 23 Gr. 218.

(f) 25 Gr. 139.

(h) L. R. 12 Chy. D. 797.

(j) 9 Gr. 478.

(l) L. R. 1 Q. B. D. 404.

(n) 33 U. C. R. 208.

(p) L. R. 8 Chy. D. 777.

(r) L. R. 10 C. P. D. 47.

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If the surety can sue the principal under the circumstances existing in this case, it follows necessarily I think, that the principal should be a party to this suit.

One of the three places of jurisdiction laid down, Mr. *Story* says, (a) by foreign jurists generally, is "the place where the contract is made, or other act done, commonly called *forum rei gestæ*, or *forum contractûs*;" and we have adopted and acted upon that principle in *Grant v. Eddy*, (b) and other cases.

Judgment.

There has not been in this case any direct contract between the defendant and *Murray*; but at the date of the filing of this bill an equity had arisen (I say this assuming the bill to be true) in favour of the defendant against *Murray* upon the instrument executed in Hamilton. It is true that the default by *Murray* did not occur in Hamilton, and that no cause of suit arose until default. But there was a potential equity in the defendant coeval with the execution of the bond, which became a right of suit upon the default of *Murray*. There was also an implied contract on the part of *Murray* to repay to his surety any money that his surety might be called upon to pay by reason of his default. This equity and this implied contract were not so much consequences flowing from the contract with the plaintiffs as parts of, and having their origin in the same transaction. They were as real and as much parts of the transaction of, to use the language I have quoted from *Story*, the *rei gestæ*, as the contract of the principal and surety with the plaintiffs.

I have examined the cases, very considerable in number, which were cited by learned counsel in their arguments of this case, but none of them appear to me to controvert the position upon which I think this case may properly be rested.

My brother *Blake* has been good enough to read to me a judgment which he has prepared, and in which I

(a) Conf. of L. Sec. 537.

(b) 21 Gr. 45.

concur. I had previously, after examining the cases, made some notes, which I have since condensed into the short judgment which I have just delivered.

I think my brother *Proudfoot* was right in requiring that *Murray* should be made a party, and that his order should be affirmed, with costs.

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v.
Springer.

BLAKE. V. C.—The plaintiffs having filed their bill in the Court of Chancery, in the Province of Ontario, must be taken to admit that this Court has jurisdiction in respect of the matters therein mentioned. According to the practice of this court, where there is a principal and a surety, a plaintiff cannot proceed against the surety, the surety taking the objection, in the absence of the principal: *Garrow v. McDonald* (a), on rehearing, *Pierson v. Barclay* (b), *Lloyd v. Smith* (c), *Seidler v. Shepherd* (d), *Cockburn v. Gillespie* (e). It is clear therefore in this case, that according to the practice of this Court, an account and payment having been demanded against the defendant *Barnes* a surety, and he having objected to the non-joinder of *Murray* the principal, the Vice Chancellor was bound to allow the objection, and require his junction as co-defendant. There is nothing to shew that *Murray* is a foreigner; on the contrary, he is stated before his absconding to have been a resident of Montreal, and formerly of Ontario, and the bond on which the right to indemnity arose was executed in Hamilton, in this Province. I take it that where this Court possesses, as it is here admitted it has, jurisdiction in a case, and a party necessary to the due prosecution of the cause is at the time resident without the Province, the Legislature of such Province has power to enable the Court to order the service of process on such party wherever he may

Judgment.

(a) 20 Gr. 122.

(b) 2 DeG. & Sm. 746.

(c) 13 Sim. 457.

(d) 12 Gr. 456.

(e) 11 Gr. 465.

1881. reside, pending the suit. The sections referred to in argument are 93 R. S. O. ch. 40, and 49 to 51 R. S. O. ch. 50, and subsec. 13 and 14, sec. 92, B. N. A.; R. S. O. p. xxxiii.

Exchange
Bank
v.
Springer.

I think the order made is correct, and that it should be affirmed, with costs.

DUMBLE v. DUMBLE.

Will, construction of—Bequest to children—"In case of death," meaning of—Vested interest.

The testator, after having duly made his will, intending to modify it, wrote a letter to his wife, in which he said : "I wish my dear wife and our children to have all my property to be divided equally, my wife to have the use of the whole until the children are of age ; in case of death of my children, my wife to have the use of the property for her lifetime, and then to go to my brothers and sisters." The testator left two children, who died during the lifetime of their mother, under age and unmarried.

Held, that the words "in case of death of my children" referred to death before the testator, so that the children took vested interests, which the mother acquired upon their death.

This was a suit instituted by *John Henry Dumble* and *David William Dumble*, executors and trustees under the will of the late *Thomas Dumble*, Esquire, against *Hester Ann Dumble* his widow for the construction of the will of the testator, which was modified to some extent by a letter subsequently written by the testator to his wife, which is set out in the judgment.

Mr. *Bethune*, Q.C., and Mr. *Watson*, for the plaintiffs.

Mr. *MacLennan*, Q.C., for the defendant, the widow.

The contention on the part of the plaintiffs was that the devise to the testator's children did not become

absolute on the death of the testator, but was liable to be defeated in case they should die before attaining majority; and that therefore, in the events that had happened, the brothers and sisters of the testator were entitled to the personal estate of the testator, subject only to the interest bequeathed to the defendant.

Edwards v. Edwards (a), *Ingram v. Soutten (b)*, *Grey v. Pearson (c)*, *Theobald on Wills*, 2nd ed., 272, 337, 483; *Williams on Executors*, 8th ed., 1266; *Hawkinson on Wills*, 231; *Jarman on Wills*, 4th ed 707, 752, were referred to.

1881.

Dumble
v.
Dumble.

PROUDFOOT, J.—The bill in this case is filed to obtain the opinion of the Court on the construction of the will of *Thomas Dumble*, dated 15th May, 1865, which was duly executed so as to pass real estate, and of a letter written and signed by him on the 17th December, 1868, but which was not executed in the presence of witnesses and was therefore ineffectual to operate on real property.

Dec. 21.

The will alone then affects the realty, and upon its provisions there is no dispute. The real contest is upon the construction of the letter, and, as it was written for the express purpose of modifying the will, no clue to its meaning can be derived from the will.

Judgment.

The letter was addressed to his wife, and is very short.

“To Mrs. *Thomas Dumble, Jr.* My Dear Wife.—I write this that in case of an accident or injury happening to myself, you might know that I have made two wills, one before I was married, which is to be considered void, but the other will I wish to modify, as it was written in a hurry. I wish my dear wife and our children to have all my property to be divided equally. My wife to have the use of the whole until the children are of age. In case of death of my children my wife to have the use of the property her life time, and then to go to my brothers and sisters.”

(a) 15 Beav. 357.

(b) L. R. 7 H. L. Ca. 408.

(c) 6 H. L. Ca. 61.

1881. The testator left two children, who have both died infants, intestate and unmarried, leaving their mother surviving, who contends that she took their shares absolutely, which is contested by the testator's brothers and sisters.

Dumble
v.
Dumble.

It was admitted that the mother and children took *per capita*, but it was said the shares of the children were not vested, or if vested were divested by their death during their mother's life.

The whole question is in a nutshell. Does the phrase "In case of death of my children," refer to death before the testator, or after that and before death of the widow?

The rule as expressed in 2 *Wm. Ex*, 1266 (8th ed.), is thus laid down: "It is fully established as a general rule, that a bequest to any person, 'and in case of his death,' to another, is an absolute gift to the first legatee, if he survives the testator, and thus whatever be the form of expression, as 'if he die,' 'should he happen to die,' 'in case death should happen to him,' and so forth.

Judgment.

The event here contemplated being so inevitable that it cannot be deemed a contingency, the Courts have held, that something else must be intended than merely to provide for the case of the legatee dying at some time or other; and have said that they will rather suppose the testator to have contemplated and provided for the case of the legatee dying in his own lifetime; and so have read these words as if they had been 'in case of his death during the testator's lifetime,' in which event alone they have allowed the bequest over to take effect."

But a different rule prevails where there is an immediate bequest to any person, "and in case of his death without children," to another; and if at any time, whether before or after the death of the testator, the legatee dies without children the bequest at once takes effect, for the event is not certain but contingent; and the cases principally relied on by the counsel for testator's brothers were of this description.

In the present case the bequest is immediate, and not contingent upon attaining twenty-one, or upon surviving the widow; and "in case of death," therefore, must refer to death in the testator's lifetime, and the children having survived that time, their interest became vested in right, though it was not to vest in possession till their mother's death, and was transmissible to their representatives, 2 *Wm. Ex.* 1209.

1881.
 }
 Dumble
 v.
 Dumble.

Judgment.

In the events that have happened, therefore, the mother is entitled to the infants' shares.

There will be a direction accordingly. Costs out of the estate.*



* This case has been carried to the Court of Appeal, and now stands for argument.

1881.

HEAMAN V. SEALE.

Fraudulent preference—Defending one suit and withdrawing plea in another—R. S. O. ch. 118, sec. 1.

The defendant, *C.*, defended an action brought against him by the plaintiffs, while in an action brought against him by the defendant, *S.*, he entered an appearance and filed a plea some days before the plea was due, and on the same day filed a *relicta. verificatione*, whereupon judgment was signed and execution issued.

Held, that these proceedings did not offend against the provisions of the Act R. S. O. ch. 118, sec. 1; following in this the decisions in *Young v. Christie*, 7 Gr. 312; *McKenna v. Smith*, 10 Gr. 40; *Labatt v. Bixell*, 28 Gr. 593; and *Mackedie v. Watt*, decided in appeal 28th Nov., 1881.

This was a suit by the plaintiffs, seeking to set aside a judgment and execution recovered by the defendants *Seale & Childs* against the defendant *Cooper*, under the circumstances clearly set forth in the judgment.

The cause came on for examination of witnesses and hearing at the sittings of the Court at London, in the Autumn of 1881.

Statement.

Mr. *McBeth*, for the plaintiff.

Mr. *McGee*, for the defendants.

Dec. 21st PROUDFOOT, J.—This action is brought to set aside a judgment as obtained in violation of the Fraudulent Preference Act (R. S. O. ch. 118.)

Judgment. The plaintiffs commenced an action in the Queen's Bench against the defendant *Cooper*, on the 21st January, 1881. *Cooper* entered an appearance, and afterwards filed pleas, so that the plaintiffs were unable to recover judgment until the 28th of March.

Meantime the defendants *Seale & Childs* commenced an action against *Cooper* in the County Court, on the 16th February; on the 19th, *Cooper* entered an appear-

ance in person, on the same day the declaration was filed; on the 21st *Cooper* pleaded to the action, and on the same day signed a *relicta verificatione*, and judgment was signed and execution issued thereon.

1881.

Heaman
v.
Seale.

After perusing the judgments in *Young v. Christie* (a), *McKenna v. Smith* (b), *Labatt v. Bixell* (c), and *Mackedie v. Watt* (d), I must hold that the judgment attacked does not offend against the provisions of the statute.

In *Labatt v. Bixell*, the Chancellor says: "The statute avoids a judgment the recovery of which is facilitated by the debtor in order to its gaining priority, but not all such judgments. There are several ways in which the recovery of judgment may be facilitated, by confession, *cognovit actionem*, or warrant of attorney: that is a class. By abstaining from making any defence in the one suit, by entering appearance and making no further defence. Only the first class in terms is prohibited by the statute." Judgment.

A *relicta verificatione*, is neither a confession, nor cognovit, nor warrant of attorney, and is therefore not prohibited by the statute.

The bill must therefore be dismissed, with costs.

(a) 7 Gr. 307.

(b) 10 Gr. 40.

(c) 28 Gr. 593.

(d) In appeal, and not yet reported.

1881.

RE DONOVAN, WILSON V. BEATTY.

Administrator ad litem—Suits improvidently instituted—Solicitor of administrator ad litem—Costs paid to solicitor—Order to refund costs improperly paid—Res judicata—Sureties of administrator ad litem.

An administrator *ad litem* had allowed suits to be brought in his name without the sanction of the Court, which both he and his solicitor had been notified, it was necessary should he obtained and a sum of \$2,738.37 for costs in respect of such suits had been paid out of the funds to the solicitor, which, it was alleged, had been so paid improvidently. The Court in a suit by the executors' against the administrator *ad litem* directed a taxation of the solicitor's bill, when a sum of \$2,012.81 was disallowed, and thereupon the sureties for the administrator, who was unable to pay, applied by petition for an order that the solicitor should repay this amount with costs.

The Court [PROUDFOOT, J.] under the circumstances made the order asked, although no taxation of the costs as between the solicitor and his client had been had, and it was denied that any arrangement existed that the solicitor should only be paid such costs as the administrator might be allowed against the estate or that any privity existed between the solicitor and the executors, and a bill filed by the executors against the administrator and his solicitor had as against the latter been dismissed with costs on the ground of such want of privity, such dismissal, not having been on the merits, could not be claimed to be *res judicata*.

Crooks v. Crooks, 1 Gr. 57, remarked upon and followed.

The nature and object of the present application appear clearly from the judgment.

Mr. Maclennan, Q. C., and Mr. O'Donohoe, for Charles Beatty, James Wilson, and Mrs. Catherine Wilson.

Mr. Moss, Q. C., and Mr. Morphy, for Haldan.

Mr. C. Robinson, Q. C., for Donovan.

Mr. Foy, for Mrs. Mary E. Wilson, the plaintiff.

Nov. 16th.

PROUDFOOT, J.—The object of the principal petitions in this matter, one filed by Catharine Wilson, Charles Beatty, and James Wilson, executors of Thomas Wilson, and another by John Haldan, is to get an order for payment into Court by Mr. Donovan, of \$2,127.31. Supplemental petitions by these parties

ask that in default of payment *Donovan* be struck off 1881.
 the roll of solicitors, and that Mrs. *Mary Ann Wilson*,
 the plaintiff, be ordered to pay a portion of that sum
 of \$2,127.31, of which she obtained the benefit, if not
 paid by *Donovan*.

Re *Donovan*
Wilson
 v.
Beatty.

In the prosecution of litigation in this Court arising
 out of the estate of *Thomas Wilson*, one *Haldan* was
 in April, 1875, appointed administrator *ad litem*.

In October, 1876, an order was made in one of the
 suits, *Wilson v. Wilson*, for *Haldan* to pay into Court
 the money in his hands, and to pass his accounts.

In pursuance of that order, *Haldan* paid into Court
 on 27th October, 1876, \$14,588.26, and in March, 1877,
 he passed his accounts, shewing that sum to be the
 balance owing by him.

Donovan was solicitor for *Haldan*, and had carried
 on litigation for the estate, and brought in bills of costs
 which were allowed by the Master, after certain deduc-
 tions to *Haldan* in passing his accounts, to the amount
 of \$2,738.37.

In a subsequent suit of *Beatty v. Haldan*, brought
 against the administrator *ad litem*, these costs were
 subjected to taxation, and a sum of \$2,012.81 was
 deducted, which with costs, \$114.50, form the sum of
 \$2,127.31, the object of these petitions, which *Haldan*
 has been ordered to pay.

In the suit of *Wilson v. Wilson*, one of the execu-
 tors was not a party, and was not bound by the moder-
 ation of the accounts rendered in that suit.

The executors having failed to recover the money
 from *Haldan*, have obtained leave to sue his sureties
 in the administration bond, and have taken proceedings
 thereon, and these petitions have been presented at
 the instance of the sureties.

The actions brought by *Donovan* in *Haldan's* name,
 were brought without the sanction of the Court, and
 after both *Donovan* and *Haldan* had been notified that
 such leave was necessary.

1881. The respondent contends that there is a distinction between the character of the petitioners: that he is not responsible to the executors; that there is no privity between them; that the dismissal of the bill against him, a bill containing similar charges to those made in the petition, has reduced the matter to a *res judicata*; that an administrator *ad litem* does not need the sanction of the Court to institute proceedings; and that the executors are bound by the taxation in *Wilson v. Wilson*.

Re Donovan
Wilson
v.
Beatty.

That, as to *Haldan's* petition, he has no right to apply for payment until he has had the bills of costs taxed as between him and *Donovan*,—that, though so large an amount was struck off in *Beatty v. Haldan*, *Donovan* may, on taxation, be able to shew that *Haldan* is responsible to him; and that there was no special bargain between the respondent and *Haldan* by which no costs were to be payable, but such as were recovered against the estate.

Judgment.

I do not think it possible to contend, after the decision in *Crooks v. Crooks (a)*, that the executors may not in such a case as this get the relief they seek by petition. On coming to the administration of the estate, they find a considerable quantity of the assets in the hands of the person who had acted as the solicitor for the estate, and they seek to have that made available for the purposes of the estate. That was just what was done in *Crooks v. Crooks*. The case here is rather stronger, for the money was received from the administrator *ad litem*, an officer of the Court, and peculiarly under its control. And this circumstance brings it within the terms of the decision in *De Winton v. Brecon (b)*, where a judgment creditor had attached money in the hands of a Receiver, and was compelled to refund it, and, as will be noticed further on, an administrator *ad litem* seems to be in the same position as a Receiver.

(a) 1 Gr., 57.

(b) 28 Beav. 200.

The dismissal of the bill in *Beatty v. Haldan* as against *Donovan* was not a dismissal upon the merits, and is no further *res judicata* than upon the one point, that an agent is not a proper party.

1881.
 Re Donovan
 Wilson
 v.
 Beatty.

“We now turn to the case against the defendant *Donovan*. We think that the bill cannot be sustained as against him. If *Haldan* has improperly paid him costs out of the assets of the estate, the former is liable, and they must settle the matter between themselves.” Per *Moss*, C. J. (b). And I think that *Maw v. Pearson* (c), was properly distinguished in the argument, for while holding that an agent was not a proper party, the Master of the Rolls says: “If *Carnochan* had improperly obtained the trust funds from *Sykes*, knowing that *Sykes* was unable to repay them, or if it were impossible to get them back from *Sykes*, * * * there might be a case.” In the present instance it has been found impossible to get back the fund from *Haldan*, and therefore, according to *Maw v. Pearson*, there is a case against the holder of the fund. Judgment.

That an administrator *ad litem* requires the sanction of the Court before taking legal proceedings, seems to result from the judgment in *Beatty v. Haldan* in Appeal (d), and the resemblance there said to exist between his position and that of a Receiver. “Now the proceedings in which the costs complained of were incurred, had not been sanctioned by the order of the Court:” 4 App. 247 and 248.

With regard to the taxation, or rather moderation, of the bills of costs in *Wilson v. Wilson*, I need only refer to the already quoted judgment of the Court of Appeal, 4 App. 248, that this proceeding was not such as should bind them: “But upon the evidence of Mr. *Donovan* himself, it is not too much to say that this

(b) 4 App. at 249.

(c) 28 Beav. at 196.

(d) 4 App. 247.

1881. taxation was little better than a travesty of fair accounting. The solicitors, who at various times appeared for Mr. *Haldan*, were really nominated by Mr. *Donovan*. According to his view, he arranged with them to act upon agency terms; that is, dividing the fees with him in some proportion. If his view be correct, the case simply is, that the estate, which had an interest in reducing his demands, was represented by his nominee on those occasions, when the appearance of a representative, independent in appearance if not in fact, was deemed expedient."

Re *Donovan*
Wilson
 v.
Beatty.

Judgment.

With regard to *Donovan's* contention, that *Haldan* cannot ask to have this money paid over until he has had the bills taxed, I do not think it ought to prevail. Mr. *Donovan* has had an opportunity of establishing his right to these costs against the estate and has failed. It may be quite accurate, as a general proposition, that the right of the solicitor against the estate is not identical with his right against the administrator, (a proposition that I neither admit nor deny), but we have here a *prima facie* case against the bills of costs; and there is besides the fact that *Haldan* has sworn that there was a special arrangement between him and *Donovan*, that the latter should have no costs save what he should recover against the estate. This is denied by *Donovan*, but there is a circumstance which, to my mind, strongly corroborates *Haldan's* evidence—viz., that there was an arrangement by which *Haldan* was to share, and did share with *Donovan*, the commission he received for managing the estate. *Donovan* does not deny the receipt of the commission, but says he got it on account of extra work. It is difficult to understand this, for I imagine that any work, extra or otherwise, would find its way into the bills of costs; and there is also to be noticed that *Haldan* had implicit confidence in *Donovan*, and they were intimate not only as solicitor and client, but socially.

It is not likely that *Donovan* was all the time relying on a right to recover from *Haldan* costs he could not recover against the estate. And there are expressions sworn to by *Haldan* after the costs had been disallowed to him, when *Donovan* intimated that it was his business, that *Haldan* need take no trouble, &c., which are only consistent with the notion that the costs were only to be such as could be got from the estate.

It is true that *Haldan's* evidence is somewhat weakened by the variance between his answer in this suit, his cross-examination on it, and his affidavits on this application. But *Haldan* swears, and it is not denied, that the answer was prepared by *Donovan*, and the language used in it is his, and was adopted by *Haldan* in his statement, that the facts were as he stated them to be: that he supposed *Donovan* to be more interested in preventing the re-opening of the accounts than *Haldan* was. However much it is to be regretted that answers are too often sworn in this careless manner, it is not for *Donovan* to take advantage of it, and turn what was intended for his benefit into a weapon against the client. Besides, if there really be anything coming to *Donovan*, he has the means of ascertaining the amount by a taxation in which *Haldan* will be represented by some one acting *really* on his behalf. And there is the further consideration, to which great weight should be attached, that I do not find any distinct allegation of *Donovan* that there is really anything due to him.

With regard to Mrs. *Wilson*, it seems she had employed *Donovan* as her solicitor prior to the appointment of *Haldan* as administrator *ad litem*, and when the administrator's accounts were being taken by the Master *Donovan* presented his bill for these services, amounting to \$567.12. As the result of the taxation in *Beatty v. Haldan*, there seems to have been allowed against the estate \$105.98, and the difference between

1881.

Re *Donovan*
Wilson
v.
Beatty.

Judgment.

1881. these sums or \$461.14, forms part of the \$2,127.31, with which *Haldan* has been charged.

Re *Donovan*
Wilson
 v.
Beatty.

There is no evidence that Mrs. *Wilson* has received any of the trust money, nor that she is owing *Donovan* any sum for costs, or if she is, that he has ever released her, and without that she would have received no benefit. If a case of this kind were intended to be made against her, it ought to have formed a charge in the bill in *Beatty v. Haldan*, to which she was a defendant. The accounts directed by that decree were taken, and the Master did not charge Mrs. *Wilson* with this sum, and if she ought to have been charged, the omission to do so was a proper subject of appeal.

Judgment.

The petitions, so far as she is concerned, are dismissed with costs.

Donovan must pay into Court the sum of \$2,127.31, with interest, as directed in the *fi. fa.*, within a month, subject to the further order of this Court, *Donovan* to pay costs of one petition.*

* Since carried to Appeal, and now stands for argument.

1881.

MCGARRY V. THOMPSON.

Will, construction of—Widow—Election—Dower—Maintenance—Conversion of realty into personalty.

A testator devised all his real and personal estate, to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life; and after the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in a course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution, amongst them, the share or respective shares only, which the deceased parent or parents would, if living, have taken.

Held, (1) that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose; (2) that a complete conversion had been effected by the trust for sale in the will, so that the interests of the sons should be ascertained as if the will consisted of personal estate only; and (3) that the sons took life estates therein only; and one of the sons having died without children that there was an intestacy as to his share, subject however, to a proportion of the charge for the maintenance of the widow.

This was a suit instituted by the plaintiff, widow of the late *William McGarry*, for the purpose of obtaining dower out of the real estate left by her husband, and for an order for payment of maintenance by her two sons, to whom the estate was devised, under the circumstances stated in the judgment.

Mr. *J. H. McDonald*, for the plaintiff.

Mr. *Arnoldi*, for the defendants.

1881.
 }
 McGarry
 v.
 Thompson.

PROUDFOOT. V. C.—William *McGarry* died 17th February, 1869, having made his will on the 23rd November 1867, by which he gave and devised all his real and personal estate to two trustees, *upon trust* to sell his real estate, and to collect and get in his personal estate, and after payment of debts, &c., to invest the money arising from the sale, &c., in the names of the trustees upon, &c.; *upon further trust* to pay the annual income to his two sons, *Edward* and *Archibald*, during their lives, in equal moieties as tenants in common, they, his said sons, thereout maintaining their mother during her life; and after the death of each of the said sons the trustees were to stand possessed of one moiety of the trust moneys *upon trust* to pay, divide, and transfer the same equally between and amongst the children of his son *Edward* as shall be living at his decease, and the issue then living of such children as shall be then dead, as tenants in common in a course of distribution according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child shall, (take) by way of substitution amongst them, the share or respective shares only while (which) the deceased parent or parents would, if living, have taken. A similar disposition of the other moiety was made in favour of the children of *Archibald* and their issue.

Judgment.

The testator then declared that the share or shares of such child or children or issue respectively as aforesaid, as shall be a son or sons, shall become payable to him or them respectively upon his or their respectively attaining the age of twenty-one years, and the share or shares of such children or issue respectively aforesaid as shall be a female or females, to be held by her or them respectively for their sole and separate use, free from the control, debts, or interference of any husband.

The bill is filed by the widow of the testator, asking a declaration that she was entitled to dower in the

land mentioned in the Bill, which is all that is left of the estate; and that the amount to which she is entitled for maintenance may be ascertained, and *Edward* and *Archibald* made to pay it. 1881.

McGarry
v.
Thompson.

Since the filing of the Bill *Edward* has died, having made a will devising all his real and personal estate to his mother the plaintiff, and appointed her his executrix. *Edward* was never married, and he and *Archibald* were the only children of the testator.

Archibald has answered, desiring that the lands be sold and the proceeds distributed pursuant to the will.

I had occasion in *Laidlaw v. Jackes* (a) to consider whether a provision for a widow similar to that in the present case was enough to put her to her election, and came to the conclusion that it was not,—and this was affirmed on rehearing (b). Following that case I must declare the plaintiff entitled to her dower as well as the provision made for her by the will.

The ninth paragraph of the Bill alleges that neither *Edward* nor *Archibald* provided for the maintenance of the plaintiff, who is now and has been for some time in destitute circumstances. This is not admitted by the answer; and as the bill is set down upon bill and answer there is no proof of the allegation. There can therefore be no account of arrears, but the plaintiff is entitled to a declaration that she is entitled to a maintenance, and to a reference to ascertain what would be a proper sum to allow for that purpose, to be charged in equal amounts on the bequests to *Edward* and *Archibald*, and *Archibald* will be ordered to pay one half. Judgment.

The principal discussion at the hearing was upon the quantity of interest taken by the sons under the will. The plaintiff contending that the language of the will if applied to real estate would have conferred an estate

(a) 25 Gr. 293.

(b) 27 Gr. 101.

1881. tail upon the sons, and the fund being personalty through the conversion effected by the absolute trust for sale it passed as an absolute interest to them.

McGarry
v.
Thompson.

The defendant, on the other hand, arguing that the sons took only a life estate, and as *Edward* died without having been married, and therefore without issue, there was an intestacy as to his share.

There is no doubt that a complete conversion was effected by the trust for sale in the will and the interests of the sons are to be ascertained as if the will was one of personal estate only.

The cases upon the subject are collected in *Jarman* on Wills vol. 2, p. 534 et seq. At p. 538 is discussed the question whether a bequest to *A*, for life, and after his death to his issue, operates by force of the rule that words that would create an estate tail in realty confer the absolute interest in personalty, to vest the absolute estate in *A*. The learned author appears to think that strictly following the rule would lead to the conclusion that *A*. was absolutely entitled. But he quotes *Knight v. Ellis* (a) as at variance with this conclusion. Lord *Thurlow* there says: "Now what do the cases come to? A man by his will devises to *A*. for life, there being plainly an interest only for life given: if that were all, the disposition would end there as to *A*., and any other gift would be effectual after his death. The testator then gives the same land over to *B*. after failure of issue of *A*. What is the Court to do? It is clear that a life-interest only is given to *A*. It is clear that no benefit is given to *B*., while there is any issue of *A*. The consequence is, that, as no interest springs to *B*., and no express estate is given after the death of *A*., the intermediate interest would be undisposed of, unless *A*. was considered as taking for the benefit of his issue, as well as of himself; and as the words in this case are capable of such amplification the Court naturally implies an intention in the testator that *A*.

Judgment.

(a) 2 B. C. C. 570.

should so take, that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail, which would descend on his issue. Now an estate in chattels is not transmissible to the issue in the same manner as real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker; but if the testator, without leaving it to the necessary implication, gives the fund expressly to the issue, they are not driven to the former rule; but the issue may take as purchasers, and then there is an end of the enlargement of any kind of the estate of the tenant for life; for another estate is given after his death to other persons, who are to take by purchase. It no longer rests on conjecture."

Some cases were decided at variance with *Knight v. Ellis*; but in *Ex parte Wynch (a)* it was approved of. This last is an important case, and the principles applicable to cases of this kind receive a thorough investigation. The Chancellor (Lord *Cranworth*) held that there is nothing in the decisions relative to the limitations of personal estate by which an absolute interest has been held to be given to the first taker, which obliges the Court in construing bequests of personalty, where technical words are not used, and the interest of the first taker is expressly confined to a life-estate, to act on principles derived from laws of tenure, and not resting in intention. And *Turner, L. J.* says that in construing a will of personal estate the Court is not to be absolutely governed by the rules which would be applied at law in the case of real estate.

There are other circumstances in the present case that rather tend to exclude it from the operation of the rule. The bequest is not to the *issue* of the sons, but to their *children*, and the inclination to adopt the construction which reads the words "child," "son," or any

1881.

McGarry
v.
Thompson.

Judgment.

(a) 5 D. M. G. 188.

1881. other such informal expression as a word of limitation, is much less strong in reference to personal than to real estate : 2 *Jarman* 542.

McGarry
v.
Thompson.

I think therefore that the testator's sons only took life-estates. And Edward having died without children there is an intestacy as to his share, but subject to a proportion of the charge for maintenance. *Earls v. McAlpine* (a).

Judgment.

Should *Archibald* die leaving children some difficulty may arise in determining their interests under the will, but during *Archibald's* life it is not necessary to determine them now, and indeed they are not now ripe for decision.

Costs of all parties out of the estate.

1881.

JOHNSTON V. REID.

Consolidation of mortgages—Valuable consideration—Registration—Hidden equities.

The rule that a mortgagee shall not be redeemed in respect of one mortgage, without being redeemed also as to another mortgage created by the same mortgagor, applies as well in a suit to foreclose as to redeem.

In such a case the property embraced in one mortgage realized more than sufficient to discharge it. The plaintiff, an execution creditor of the mortgagor, obtained a security on the lands comprised in such mortgage which was registered after it, but without notice thereof. On a sale of the lands embraced in another mortgage a loss was sustained by the mortgagee.

Held, (1) that the defendant, the mortgagée, had not the right, as against the plaintiff, to consolidate his mortgages, and make good the loss on the one out of the surplus on the other sale, the policy of the Registry Act being to give no effect to hidden equities. (2) That by taking a mortgage, and thus giving time to the mortgagor, the plaintiff was a holder of his mortgage for value.

This was a bill by *Jennie Johnston* against *William Reid* and *Edward R. C. Clarkson*, setting forth that the late *Robert Harstone* was indebted to the late *William Johnston* in \$903.04 for which he gave the said *Johnston* his promissory note payable 31st May, 1878. That the plaintiff administered to the estate of *Johnston* and was his legal personal representative. That *Robert Harstone* died on the 29th April, 1878, having first made his will, whereof he appointed his widow *Jane Harstone* executrix, and thereby devised to her all his real estate in fee. Statement.

The bill further stated that, in 1879, the plaintiff instituted proceedings against Mrs. *Harstone* as such executrix and recovered judgment for \$1055.70, on which she sued out execution, and to secure the payment of such debt &c., she executed a mortgage upon certain lands in the town of St. Mary's the same

1881. being part of the real estate of the said *Robert Harstone* and devised as before stated to his widow, and the said will and mortgage were duly registered; but at the time plaintiff took her said mortgage the lands therein mentioned were subject to a mortgage made by *Harstone* in his life time to the defendant *Reid* for \$2,200 which was duly registered prior to the plaintiff's incumbrance, but of which she had not at the time of accepting her security any knowledge or actual notice. That default having been made in payment of *Reid's* incumbrance he proceeded to a sale of the mortgage premises under a power contained in the mortgage, and which he sold for \$3,800, which was more than sufficient to cover the amount due him on such mortgage, and at the time of such sale he, (*Reid*) had full notice and knowledge of the claim of the plaintiff.

Statement.

The bill further alleged that prior to instituting proceedings in this suit the plaintiff had applied for a statement of his claim, as well as of the amount realized on such sale, and payment over to her of any surplus over and above his demand; but though he furnished a statement of what was produced by the sale and the amount due for principal and interest, he did not furnish any memorandum shewing the amount of costs incurred in effecting such sale, and refused to pay over the surplus in his hands, on the alleged ground that he held another mortgage on certain property in the township of Hamilton executed by *Harstone*, and that default had been made in payment thereof, and that he had taken proceedings upon such second mortgage and sold the lands embraced therein, but the sale thereof had not realized sufficient to pay such mortgage, and he claimed the right therefore, to, hold the surplus arising from the sale first mentioned and apply it in payment of such alleged loss on the last mentioned sale in priority to the claim of the plaintiff, although she never had had any notice or knowledge of such second mortgage.

The bill further set forth that on the 7th of January, 1880, the said *Jane Harstone* then being a trader within the meaning of the Insolvent Act of 1875, became insolvent, and such proceedings were had under the said Act that the defendant *Clarkson* became and continued to be the assignee of her estate and effects and, amongst others, any surplus that might remain after payment of the claim of the defendant *Reid* and of that of the plaintiff; and the plaintiff submitted that she was entitled to be paid the surplus arising from the sale first mentioned, after payment in full of the claim of the defendant *Reid*, and this, notwithstanding the alleged loss on the secondly mentioned mortgage held by *Reid*.

1881.
 Johnston
 v.
 Reid.

The prayer of the bill was, (1) that the plaintiff might be declared entitled to such surplus; (2) that an account might be taken of what was due *Reid* on his said firstly mentioned mortgage up to the time of such sale, together with his costs of conducting such sale; (3) that *Reid* might be ordered to pay plaintiff the amount of such surplus; (4) that in default of payment writs of execution might issue; (5) that the defendants or one of them might be ordered to pay the costs of this suit; (6) that all necessary directions might be given and accounts taken; and (7) further relief.

Statement.

The defendants answered the bill, and the suit, having been put at issue, came on for examination of witnesses and hearing at the sittings of the Court at Stratford in the Spring of 1881.

Mr. *Moscrip*, for the plaintiff.

Mr. *Boyd*, Q. C., for the defendant *Reid*.

Mr. *Fisher*, for the defendant *Clarkson*.

The defendant the Rev. Dr. *Reid* was examined as a witness, and he stated in effect that the property in the township of Hamilton had been sold firstly under

1881. the power of sale contained therein: that it did not realize what was secured upon it by \$1100: that the property in St. Mary's was then sold, and this realized \$500 over and above what was due upon the mortgage upon it, and this difference or excess was what was in question between the plaintiff and himself.

Johnston
v.
Reid.

In addition to the cases mentioned in the judgment counsel referred to *Brower v. Canada Permanent Building Association* (a); *Dominion Savings &c. Society v. Kittridge* (b); *Willie v. Lugg* (c); *Grey v. Ball* (d); *Gordon v. Ross* (e); *Daniels v. Davidson* (f); *Barnhart v. Patterson* (g); *Long v. Long* (h); *Collver v. Shaw* (i).

June 11th. SPRAGGE, C.—In my opinion the evidence does not establish that the plaintiff had notice of the mortgage held by the defendant Dr. Reid upon the Hamilton land; and I am not prepared to say that if she had had notice—*i. e.* of the bare fact of the existence of that mortgage—it would have made any difference in the case.

It was the right certainly of Dr. Reid, as holder of that mortgage as well as of the mortgage on the St. Mary's property, to say to Mrs. Harstone, the devisee of the mortgagor, that he would not be redeemed as to one only, but must be redeemed as to both. That was an equity upon which he had a right to insist; and it was decided in *Watts v. Symes* (j), that the equity prevails where the holder of the mortgages files a bill to foreclose as well as where a bill is filed to redeem. *Watts v. Symes* (j), has been followed in *Selby v. Pomfret* (k), and other cases.

(a) 24 Gr. 509.

(c) 2 Ed. 78.

(e) 11 Gr. 124.

(g) 1 Gr. 459.

(i) 19 Gr. 599.

(k) 1 J. & H. 336, S. C. 3 D. F. & J. 585.

(b) 23 Gr. 631.


(d) Ib. 390.

(f) 9 Gr. 173.

(h) 16 Gr. 239.

(j) 1 D. M. & G. 240.

The plaintiff's mortgage was a mortgage on the St. Mary's property subsequent to the mortgage of Dr. Reid; both mortgages were registered, Dr. Reid's first. His mortgage upon that property was more than sufficient to secure that mortgage debt. The Hamilton property was an insufficient security for the debt thereby secured; the more than sufficiency of the one and the insufficiency of the other appeared upon the sale of each under power of sale contained in the respective mortgages.

1881.

 Johnston
 v.
 Reid.

The right of Dr. Reid to come upon the St. Mary's property to make good the deficiency on the Hamilton property is an equity. It cannot be placed higher than an equity affecting the St. Mary's property; and under *McMaster v. Phipps* (c) would have been held to be an equity affecting the St. Mary's property against the plaintiff's registered mortgage because it was itself incapable of registration. But then we have the Registry Act of 1868, 31 Vict. c. 20, the 68th section of which is in these words "No equitable lien, charge, or interest affecting land shall be a valid charge in any Court in this Province after this Act shall come into operation as against a registered instrument executed by the same party his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act." ^{¶ Judgment.}

The learned counsel for Dr. Reid contended that this could only apply where the "registered instrument" was founded upon a valuable consideration; and that the plaintiff's mortgage, having been given for an antecedent debt, which he contended was not a valuable consideration, was not protected by section 68; and he referred to several American cases in support of his position.

A leading American authority upon the point is the case of *Dickerson v. Tillinghast* (d), where Chancellor

(c) 5 Gr. 253.

(d) 4 Paige 215, 221.

1881. *Walworth* says that if a person merely takes the legal estate in payment of or as security for a previous debt, without giving up any security or divesting himself of any right or placing himself in a worse situation than he would have been if he had received notice of the prior equitable title or lien, previous to his purchase, the Court will not permit him to retain the legal title he has thus obtained to the injury of another. In *Manhattan Co. v. Evertson* (a) the same learned Judge uses this language: "In this case, as the mortgage was given merely as a further security for antecedent debts the prior equity and legal rights of the other judgment creditors must prevail as against one who cannot protect himself as a *bonâ fide* purchaser." There are other American cases affirming the same doctrine. The doctrine is not, however, held universally in the American courts. In *Morse v. Godfrey* (b), *Story, J.*, referring to *Dickerson v. Tillinghast* said that he was "not prepared to go quite that length, seeing that by securing the estate as payment, the pre-existing debt is surrendered and extinguished thereby." In *Manning v. McClure* (c), a number of American cases upon this point are reviewed, and it is shewn that they are by no means uniform upon the general doctrine. There is, however, one point upon which all or nearly all of them agree, viz., that if a creditor takes a mortgage for an antecedent debt, not as a collateral security merely, but thereby giving time to his debtor, that is a valuable consideration. In this case the plaintiff had recovered judgment and had writs of *fi. fa.* against goods and lands of the debtor current in the hands of the sheriff when the mortgage was given. If thereby time was given (the mortgage is not before me, and I cannot speak with certainty,) the case would be brought within the American authorities cited for the defendant *Reid*.

Johnston
v.
Reid.

Judgment.

(a) 4 Paige 276.

(b) 3 Story 389.

(c) 36 Ill. 490.

And we are not without English authority upon the point, In *Percival v. Frampton* (a), Parke, B. said "If the note were given to the plaintiffs as a security for a previous debt, and they held it as such, they might be properly stated to be holders for a valuable consideration," and in this *Alderson*, B., concurred. So in *Poirier v. Morris* (b), a bill of exchange taken for an antecedent debt was treated by the Court as taken and to be held as taken for a valuable consideration. There can be no distinction I apprehend, upon this point, whether it be a bill or note or a mortgage that is taken for an antecedent debt.

1881.

Johnston
v.
Reid.

The right of the holder of two mortgages to insist that one shall not be redeemed without the other had been carried to great lengths, and so as to affect materially the market value of lands subject to mortgage. Sir *W. Page Wood*, in *Beevor v. Luck*, speaks of it as a rule "Which is somewhat difficult to reconcile altogether with sound principles," meaning, as I apprehend, when carried to the extent to which it was carried in England.

Judgment.

The policy of our Legislature has been to allow no effect to occult equities, and in the case of transfers of real estate, whether absolutely or by way of mortgage; that men dealing in real estate should be able to find the state of the title by search in the registry offices, and in one or two other public offices. The 68th section of the Registry Act is an instance of this.

In my opinion the plaintiff is entitled to what is asked by the prayer of her bill, (the fourth prayer, however, for execution is unnecessary), and with costs, except the costs occasioned by *Clarkson* assignee of *Mrs. Harstone* being made a party, and the plaintiff must pay *Clarkson* his costs and should not have them over against the defendant *Reid*.

(a) 2 C. M. & R. 183.

(b) 2 E. & B. 89.

1881.

MCDONALD v. FORRESTAL.

Consignment of goods subject to payment—Agreement that purchaser shall not sell—Passing property.

The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made certain payments. Without making such payments, however, A. sold the oil without the knowledge of the plaintiff.

Held, (following *Walker v. Hyman*, 1 App. R. 345), that the plaintiff was entitled to recover from the purchaser the price of the oil, although his purchase had been made in good faith and without any notice of the stipulation between the plaintiff and A.

Statement.

This was a bill by John McDonald against *John Forrestal*, *John W. McIntosh*, and *Stephen A. Adams*, the object of which was to enforce payment of the value of five car loads of crude oil, the goods of the plaintiff, of which he was the owner under certain assignments from the defendant *Adams* to himself; and he had agreed to consign certain quantities of such crude oil to *Adams*, who was a refiner, but with the express understanding that the oil was to remain the property of the plaintiff until a payment of \$1.60 per barrel was made by *Adams* to plaintiff. It appeared that during the months of December and January next preceding the hearing a consignment of twenty-one car loads was made by plaintiff to *Adams* who handed five car loads over to *Forrestal* and *McIntosh*, but the price so agreed upon had never been paid.

The defendants *Forrestal* and *McIntosh* answered, setting up that they were not aware of the existence of any special arrangement between plaintiff and *Adams*; that they had obtained the oil in the regular course of business, and knew nothing about *Adams* being in difficulties. The defendant *Adams* also put in an answer denying the stipulation alleged by the bill, and

asserting on the contrary, that *McDonald* had agreed that he should have the right to dispose of it in the ordinary course of business.

1881.
 McDonald
 v.
 Forestal

The cause came on for the examination of witnesses and hearing at the Autumn sittings in London.

Mr. *Moss*, Q. C., for the plaintiff.

Mr. *Gibbons*, for defendants.

It was conceded, by counsel, that as between plaintiff and *Adams* the latter had not any authority to sell the oil until it had been paid for. It was contended that *Forrestal* and *McIntosh*, having purchased in good faith for value without any notice whatever of the stipulation as to payment before selling, they were entitled to hold the property as *bonâ fide* purchasers. *Crossman v. Shears (a)*; *Walker v. Hyman (b)*; *Pickard v. Sears (c)*; *Johnson v. Credit Lyonnais Co. (d)*; *Chitty* on Contracts, 10th ed., p. 355, were referred to.

PROUDFOOT, J.—In this case the plaintiff agreed to ship crude oil to one *Adams*, but so as not to alter the property till *Adams* made certain payments.

Dec. 7th

Adams was a refiner of crude oil, and sold to the other defendants five car loads of the oil purchased from the plaintiff.

The sale was not for cash, but in payment of a prior indebtedness.

At the hearing I considered the plaintiff entitled to recover—*Adams* never having paid for the oil—but at the pressing instance of the defendant's counsel suspended judgment till I had again read the case of *Walker v. Hyman*, and others of that class, and also to con-

(a) 3 App. R. 583.

(b) 1 App. R. 345.

(c) 6 Ad. & E. 466.

(d) L. R. 3 C. P. D. 32.

1881. sider whether the plaintiff was not estopped from questioning the title of *Adams*, on the principle of *Pickard v. Sears* (a).

McDonald
v.
Forrestal.

The evidence satisfied me that the plaintiff did not know of the intended sale to the defendants until after it was made: that he did not deal with *Adams* as a seller to others of crude oil, but as a refiner,—that it was plaintiff's interest to have the refinery kept up as a going concern.

On again reading the case of *Walker v. Hyman* it is impossible for me to decide either point in favour of the defendants. Both questions are discussed and passed upon in that case, under circumstances not more favorable to the plaintiff than those here; and the decisions binds me.

I may refer to *Benjamin* on Sales, 320, n. d.

Mr. *Gibbons* urged very strenuously that *Ex parte Powell, In re Matthews* (b), shewed that the property would pass unless there was a custom to the contrary. But that is a mistaken view of the case, even were I at liberty to consider it anew; for in that case there was no agreement, but the plaintiff claimed upon the ground of custom, and of course he had to establish it, and the argument and judgment were directed to the question whether the evidence sufficed to establish it.

The plaintiff is entitled to judgment, with costs.

(a) 6 A. & E. 469.

(b) L. R. 1 Ch. D. 501.

1881.

IN RE JARVIS V. COOK.

Sale by assignee in insolvency—Advertising sale—Notice—Statute of Limitations—Payment of taxes.

The rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of such power, is also applicable to sales by a trustee or *quasi* trustee acting under a power;—the power must be followed: and the rule applies with equal force to sales by an assignee of an insolvent estate, under the Act of 1869, sec. 47, who in such cases acts under a statutory power authorizing a sale, “but only after advertisement thereof for a period of two months.”

An assignee proceeded to sell the lands of the insolvent without giving notice of such intended sale “for a period of two months” as prescribed by the Act, no sanction of the creditors thereto having been given.

Helā, a good objection to the title by a vendee of the purchaser at such sale.

Where a vendor was not in possession of lands, the fact that for upwards of ten years he had paid the taxes on the property is not such a possession as is requisite to bar the right of the owner under the Statute of Limitations.

This was a proceeding under the Vendors and Purchasers’ Act, R. S. O. ch. 109, to obtain the judgment of the Court upon certain objections raised to the petitioner’s title by the purchaser.

Statement.

The facts were briefly as follow:

The vendor purchased the land in question in 1854. It was then vacant, and the only act of ownership exercised by him at that time was the payment of taxes. On the 10th of May, 1854, he sold a portion of the land to one *Proudfoot*, and on the 29th of May he sold another portion to one *Gordon*. Each of the purchasers gave back a mortgage to the vendor for the purchase money remaining unpaid. *Proudfoot* subsequently sold his portion to *Gordon*, subject to the mortgage, and in 1855 *Gordon* conveyed both parcels to *Andrew Heron*, subject to the mortgages, which *Heron* assumed the payment of. *Heron* paid interest on the mortgages until about 1858, but not afterwards. Since that date the

1881. vendor had paid the taxes on the lands. In 1863 the vendor made an assignment upon certain trusts, with an ultimate trust in favour of himself. Subsequently and in 1873 the trusts of the deed having been satisfied, the lands were reconveyed. About the year 1872 or 1873 the vendor fenced in the lands in question. Subsequently *Heron* made an assignment under the provisions of the Insolvent Act of 1864, to *W. T. Mason*, of Toronto, official assignee. Under the provisions of the Act of 1869, *Mason* advertised the interests of *Heron* in the lands for sale by auction, and on the 14th of November such sale took place pursuant to the advertisement. The advertisement of sale was by putting up a notice in the office of the Clerk of the Peace of York, dated June, 1873, which notice was continued so posted until a day subsequent to the day appointed for the sale, and also by advertising in the *Ontario Gazette*, on the 20th and 27th days of September, and the 4th, 11th, 18th, and 25th days of October, 1873.

Statement. The notice and advertisement contained full particulars of the property to be sold, the time and place of sale, the name of the insolvent, and also of the assignee.

On the 20th of November, 1873, *Mason* under the provisions of the Act conveyed to the vendor the lands in question, he having been declared the purchaser at the sale, since which time the vendor remained in possession of the lands, and exercised such acts of ownership as could be done in regard to vacant land, and no adverse claim was ever made. Subsequently *Jarvis* entered into a contract of sale with the purchaser, who, though willing to complete the purchase, raised the following objections to the title.

1. That section 47 of the Insolvent Act of 1869, gave general power to the assignee to convey, but only after an advertisement of two months, and the advertisement in question was only for a period of six weeks.

2. That there was no possessory title in the vendor, as the estate was out of him until 1873, the same being

either in his trustee or *Andrew Heron*, and that the payment of taxes during that time was only evidence of a determination to preserve his legal estate in the lands as mortgagee, and was not evidence of exercising the right of possession as against the mortgagor.

1881.

Re *Jarvis*
v.
Cook.

Mr. *Bethune*, Q. C., for the vendor.

Mr. *Rose*, for the purchaser.

The following cases were cited: *Davis* v. *Henderson*, (a); *Doe Macdonell* v. *Ratray* (b); *Doe Perry* v. *Henderson* (c); *Schofield* v. *Dickenson* (d); *Hall* v. *Evans* (e); *Russell* v. *Romanes* (f); *Hall* v. *Hill* (g); *Connor* v. *Douglas* (h); *Patterson* v. *Todd* (i); *Jarvis* v. *Brooke* (j); *Jarvis* v. *Cayley* (k). Insolvent Act of 1869, sections 47-8, C. S. U. C. cap. 22, section 267.

SPRAGGE, C.—I am of opinion that the title which the vendor shews by his petition he can make to the purchaser is not such a title as the purchaser is bound to accept,

March 12th.

Judgment.

I think there has been no valid sale by the assignee in insolvency of *Andrew Heron*.

Under the Insolvent Act of 1869, sec. 47, "the assignee may sell the real estate of the insolvent, *but only* after advertisement thereof for a period of two months," which may be shortened to not less than one month—not however by the assignee; but what is required for such shortening of time is an act of the creditors, and that act must be approved by the Judge. This shews how material the publishing of the advertisement for the time prescribed by the Act is held by the Legislature.

(a) 29 U. C. R., at p. 359.

(b) 7 U. C. R. 326.

(c) 3 U. C. R. 486.

(d) 10 Gr. 226.

(e) 42 U. C. R. 190.

(f) 3 Appeal Reports 635.

(g) 2 Error and Appeal 569.

(h) 15 Gr. 456.

(i) 24 U. C. R. 296.

(j) 11 U. C. R. 299.

(k) 11 U. C. R. 288.

1881.
 Re Jarvis
 v.
 Cook.

The assignee in selling the real estate of the insolvent acts under a statutory power. The general rule is, that where trustees, or *quasi* trustees act under a power, the power must be followed; and so a mortgagee selling under power of sale in his mortgage, must observe the terms of the power of sale.

The cases cited are cases of sales in execution, and of tax sales.

In *Connor v. Douglas* (a) the right of appeal was dissented from by Chief-Justice *Draper* and Vice-Chancellor *Mowat*; and in *Patterson v. Todd* (b)—a sale in execution—the same learned Chief-Justice, while holding the purchaser not affected by irregularities in the advertisements by the sheriff, drew a distinction between the different parts of the Act authorizing sales, and says that it is not “a positive prohibition to its execution until a stated event has happened, for it is not said there shall be no sale until or unless the sheriff has advertised.” But that is in effect said by the Insolvent Act, for there is no real distinction between saying there shall be no sale until or unless the sheriff has advertised for a certain time, and saying the assignee may sell, but only after advertising for a certain time.

Judgment.

The words used in the Act authorizing sales in execution and for nonpayment of taxes are essentially different from the words used authorizing sales in insolvency. It must, to say the least of it, be doubtful whether the words used in the Insolvent Acts would receive the same construction as the words used in the other Acts; and such being the case my opinion is, that the first objection by the purchaser is well taken.

The second objection is in my opinion also well taken. There has been no such possession by the vendor as would be a possession under the Statute of Limitations, for such period as would extinguish the

(a) 15 Gr.

(b) 24 U. C. R. 301.

right of any one. There has been a payment of taxes for over ten years, but that has never been adjudged to be sufficient. In *McDonell v. Rattray* (a), Sir John Robinson said, "The paying of taxes signifies nothing." Mr. Justice Morrison, in *Davis v. Henderson* (b), questioned this; and thought it an important fact. I scarcely think he would hold it a material fact, where taxes have been paid under the circumstances under which the taxes have been paid by this vendor.

1881.

Re Jarvis
v.
Cook.

Judgment

I have seen no case which leads me to think that anything done by the vendor for a period of ten years would be held by the Court as a possession under the Statute of Limitations.

I must therefore hold both objections taken by the purchaser as sufficient.

(a) 7 U. C. R. 326.

(b) 29 U. C. R. 359.

1881.

HARDING V. THE CORPORATION OF THE TOWNSHIP OF CARDIFF.

*Municipal Act—Award—Costs—Railway charters—Trifling amount—
Dignity of Court.*

There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation.

Upon a construction of sections 373 and 456 of the Municipal Act, (R. S. O. ch. 174) a municipal corporation has power to enter upon and take lands for the purposes permitted by the Act without first making compensation to the owner who is not entitled to insist upon payment as a condition precedent to the entry of the corporation.

Where a municipal corporation had so entered, and a bill to set aside an award for improper conduct of the arbitrators and inadequacy of compensation failed, the Court (PROUDFOOT, J.) on dismissing the bill ordered the plaintiff to pay all costs, as the corporation had properly exercised their statutory rights.

The question involved being of a public nature, the fact that the award was for an amount which in other cases would be beneath the dignity of the Court, was not any reason why the Court should not entertain the suit.

This was a bill filed to set aside an award settling the amount of compensation to which the plaintiff was entitled at \$45, for a road passing through his lands, on the grounds that the by-law was void and the award invalid under the circumstances appearing in the judgment.

Statement.

When the cause was brought to a hearing the defendants offered to waive the award so made and to proceed to a new arbitration, which was assented to by the plaintiff and the parties proceeded anew, when the arbitrators fixed the amount to be paid plaintiff at \$25.

The cause was thereupon set down to be argued as to the question of costs.

Mr. *Moss*, Q. C., for the plaintiff.

Mr. *S. H. Blake*, Q. C., for the defendants.

1881.

Harding
v.
Corporation
of Cardiff.

Wall v. Cockerell (a); *St. George's Church v. Grey (b)*; *Steuart v. Baltimore (c)*; *Metropolitan Asylum District v. Hill (d)*; *Wightman v. Fields (e)*; were referred to.

PROUDFOOT, J.—The only question discussed in this case was, which party was to pay the costs; and at the hearing I determined that the plaintiff must pay all the costs except those incurred prior to the making of the first award, and as to these I reserved the decision. Oct. 25th.

The determination of this point turns upon the construction of the powers conferred on Municipal Councils by the Municipal Act R. S. O., ch. 174, to take lands for roads, and if they can do so without first making compensation for the land so taken.

This is an exercise of the right of eminent domain, and, in this country at least, there is no doubt that the Legislature has the power, if it choose, to entrust the municipalities with such an authority. The right to take private property against the will of the owner is so serious an infringement of the rights of property that a strict construction will be placed upon it, and the authority must be found in no doubtful terms within the bounds of the statute—that is, upon a reasonable construction, either expressly or by necessary implication: *Dillon*, ch. xvi. passim. And in construing the Municipal Act, a distinction is very obvious between it and Acts giving power to railway and other companies to expropriate private property. These companies are commercial undertakings for the purpose of gain or profit, and though in the pursuit of wealth Judgment.

(a) 6 Jur. N. S. 768.

(b) 21 U. C. R. 265.

(c) 7 Maryland, 500.

(d) L. R. 6 App. Ca. 193.

(e) 19 Gr. 559.

1881. they may incidentally contribute to the public benefit, yet that is not the object of their formation. The *fames auri*, the hunger for gold, is the predominating motive, and the charters granted to them may very properly be construed with a rigidity that would not be proper in the case of a municipal corporation, the members of which are elected by the people, and whose whole object must be assumed to be for the common weal. In the absence of any clear expression of the mind of the Legislature, the just and equitable rule is that payment should precede, or at all events accompany the act of expropriation.

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of Cardiff.

Judgment.

The councils have power to pass by-laws for opening roads (sec. 509); but must not do so until eight days' notice in writing has been given to the person in possession (sec. 512). Every council shall make to the owners of real property entered upon, taken, or used by the corporation in the exercise of its compulsory powers, due compensation for damages necessarily resulting from the exercise of these powers, and if not mutually agreed upon the amount is to be determined by arbitration (sec. 456). And in case of an arbitration between the corporation and the owner as to compensation for real property entered upon, taken, or used by the corporation in the exercise of any of its powers, the mode of appointing arbitrators is determined by section 373.

All these clauses in regard to compensation speak of the land for which compensation is to be made in the past tense, as having been entered upon, taken, or used by the corporation. And when so taken, compensation is to be made.

If I were to make payment a condition precedent, it would be inserting words in the Act that are not found there, and would be inconsistent with the general functions conferred upon these local parliaments. If no provision had been made for compensation, another construction might have been warranted, but here a

“certain and adequate provision has been made by which the owner can coerce compensation, through the judicial tribunals or otherwise, without unreasonable delay,” (*Dillon*, sec. 480).

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 v.
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 of Cardiff.

There is no surprise upon the owner, for he has to receive notice of the intention to pass the by-law, and may attend and offer any reasons he may think of value in opposing the project, and no doubt might also ask that compensation be made before taking. But if no provision for pre-payment be made, the owner is not without remedy, for he may immediately, upon the passing of the by-law to take the land, apply for an arbitration (sec. 373).

In the present case the council passed a by-law to open the road in question in June, 1878, and as that is not now questioned, I presume it was passed with all proper formalities. Both the defendants and the plaintiff soon after appointed arbitrators, but the endeavour to get a third arbitrator, failed, and I came to the conclusion that the proceedings on that reference were abandoned.

Judgment.

In August, 1880, a new by-law was passed by the defendants appointing a new arbitrator, of which notice was served on the plaintiff on the 3rd September. The plaintiff took no notice of this. On the 5th November, the defendants applied to the County Judge to appoint an arbitrator for the plaintiff, which he did. The two arbitrators met and appointed a third, and these proceeded to make an award, which was duly made on 7th December, determining compensation for the plaintiff at \$45. But pending these proceedings, and on the 12th November, the defendants took possession of the road, and did the damage for which compensation was so awarded. On the 20th November, and a short time before the award, this bill was filed, but not served till the day the arbitrators met, the 23rd November. The amount of the compensation was tendered to the plaintiff, which he refused to take. At the hearing of

1881. the cause, the object of which was to set aside the award on the ground, among others, of improper conduct in the arbitrators and for inadequate compensation, the defendants, while not admitting but expressly denying the improper conduct charged against them, expressed their readiness to waive the award and arbitrate anew. This has been done, and this last award assigns to the plaintiff \$25 for damages, instead of \$45 given him by the former award.

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of Cardiff.

I think that under the statutes the municipality has power to enter and take the land before payment of the compensation, and that under the circumstances detailed above they have properly exercised the powers vested in them, and therefore that the plaintiff must pay all the costs.

There were other reasons on which the claim for costs was pressed—the unproved charges of improper conduct, and that the sum awarded was beneath what is termed the dignity of the Court.

Judgment.

This last ground I do not think tenable. The question is of a public nature, and involves the powers of municipalities to expropriate private property. The other might, to some extent, be available, but I prefer to rest the case on the first ground mentioned.

1881.

FARRELL V. CAMERON.

Trustee and cestui que trust—Marriage settlement—Woman past child bearing.

The plaintiff, in 1854, being about to marry, conveyed certain lands to trustees—one of whom was her intended husband—upon trust to suffer her to receive the rents, &c., to her own use during her natural life, and upon her death, if she should leave a child or children surviving her, in trust to convey the lands, &c., unto such child or children, their heirs, &c., for ever, freed and discharged of the trust mentioned in the deed ; and in case of her death before her husband without any child, in trust to permit him to receive the rents, &c., for life, and after his death, or in case he should die before the plaintiff, she leaving no child, then in trust to convey the said lands to her right heirs, freed and discharged from the trusts thereof. The deed gave the trustees power to sell or lease, and also to borrow on the security of the lands.

The husband died in 1879, there never having been any child of the marriage, and the plaintiff, who was then fifty-three years old, requested the trustees to reconvey the trust estate to her, which they declined to do without the sanction of the Court, as the trust for children was not confined to the issue of the then contemplated marriage, but was wide enough to include the children of any other marriage : but

Held, that as there were no children, and it must be assumed that the plaintiff never could have any children, she was entitled, as equitable tenant in fee simple, to call upon the trustees for a conveyance ; the costs of the trustees to come out of the estate.

This was a suit to compel the trustees of a marriage settlement executed at the time of the marriage of the plaintiff, to reconvey the settled estate to the plaintiff under the circumstances stated in the judgment. Statement

The trustees, it appeared, were willing to reconvey, if in the events that had arisen they could legally do so.

Mr. *McMichael*, Q. C., for the plaintiff.

Mr. *McCarthy*, Q. C., for the defendants.

In addition to the cases mentioned in the judgment, *McDonald v. Heselrige (a)*, *In re Millner's Estate (b)*, were referred to.

(a) 16 Beav. 346.

(b) L. R. 14 Eq. 245.

1881. PROUDFOOT, J.—A marriage being contemplated between Miss *Jarvis* and Lieutenant *Farrell*, R. E., by a settlement dated the 23rd June, 1854, and made between Miss *Jarvis* of the first part, and Lieutenant *Farrell* and Mr. *Cameron* of the second part, Miss *Jarvis* conveyed certain lands to the parties of the second part, as trustees to have and to hold to them, their heirs and assigns, upon trust, &c., to suffer and permit the party of the first part to have, receive, and take the rents, issues, and profits thereof, to and for her own use and benefit and behoof, for and during her natural life; and upon and immediately after the death of the said party of the first part, if she should leave a child or children surviving her, in trust to convey and assure the lands, or such of them as should remain undisposed of under the provisions thereafter contained, unto such child or children, if more than one, share and share alike, and to their heirs and assigns for ever, freed and discharged from the trusts of that deed. And in case the party of the first part should die before Lieutenant *Farrell*, without leaving any child or children surviving her, in trust to permit Lieutenant *Farrell* to receive the rents, &c., for life; and upon and immediately after his death, or in case he should die before the party of the first part, she leaving no child or children surviving her, then upon and immediately after her death in trust to convey and assure the lands, or such of them as should be undisposed of, unto her right heirs and their heirs and assigns, freed and discharged from the trusts of that deed.

Nov. 9th.
Judgment.

A power to sell and to lease was then given to the trustees, and also a power to borrow.

The parties were married, but never had any children. Lieutenant *Farrell* died in 1879. Mrs. *Farrell*, the plaintiff, is now 53 years old; and she has requested the trustees, Mr. *Cameron*, and Mr. *Jarvis* who I suppose has been appointed a trustee under the power in

the settlement, to reconvey the trust property to her. The defendants decline to do so without the sanction of the Court, as the trust for children is not confined to the issue of the then contemplated marriage, but is wide enough to include the children of any other marriage.

1881.

Farrell
v.
Cameron.

The plaintiff contends that the settlement was erroneously prepared, and it never was intended that the trusts should include any but the children of the marriage then in contemplation; and perhaps there is evidence to warrant a rectification of the deed; but I prefer to place my decision upon another ground, viz., that in the events that have happened the trusts of the settlement are exhausted.

The property was conveyed to the trustees upon a special trust, and the legal estate continues vested in them. The trusts upon which they held it were first for the plaintiff for life, and upon her death for her children. The rule in *Shelley's Case* would have no application in such case, for the children would take by purchase. If it were otherwise, a marriage settlement would be valueless at the option of the settlor. But there are no children; and under the decisions referred to, I must assume that the plaintiff can never have any children; the trust therefore now is for the plaintiff for life, and upon her death for her right heirs. In this last trust, the heirs take *qua* heirs, or, as it is termed, by limitation, and the rule in *Shelley's Case* applies, and the plaintiff is equitable tenant in fee simple; and she is entitled to call upon the trustees for a conveyance.

Judgment.

There will be a declaration accordingly. The costs of the trustees will come out of the estate.

See *Davidson v. Kimpton (a)*, *Re Widdows' Trusts (b)*, *Croxton v. May (c)*, *Lewin on Trusts*, 3rd ed., 141, *et seq.*, and 246, *et seq.*

(a) L. R. 18 Chy. D. 213.

(b) L. R. 11 Eq. 408.

(c) L. R. 9 Chy. D. 388.

1881.

STARK V. SHEPHERD.

Vendor and Purchaser—Mortgage—Costs.

The plaintiff purchased a house and lot from defendant for \$2,000, paying \$1,000 in cash, and assuming a mortgage to a building society "on which \$664 is yet unpaid," and giving a mortgage to the defendant for the balance. The defendant covenanted that he had not incumbered, save as aforesaid. Subsequent inquiries shewed that there were due the society seventy-one monthly instalments of \$16.75, in all, \$1189.25, and the plaintiff insisted that she was entitled to credit from the defendant for the difference between \$664 and the latter sum. But

Held, that the plaintiff was entitled to retain in his hands only the cash value of the mortgage at the date of his purchase, if the society would accept it, if not then such a sum as, with interest on it, would meet the accruing payments.

The defendant by his answer admitted an error in the computation of the amount due the society, and offered to pay the difference between the \$664 and what he alleged was the cash value and costs up to that time.

Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer.

Examination of witnesses and hearing:—

The facts giving rise to the suit appear in the judgment.

Mr. Moss, for the plaintiff.

Mr. A. MacNabb, for the defendant.

Judgment. PROUDFOOT, V. C.—The plaintiff agreed to purchase a house and lot on Baldwin street from the defendant for \$2,000, payable as follows: \$1,000 cash on the 6th July, 1877, the plaintiff to assume a mortgage to a Building Society for about \$700, and to give a mortgage for the balance.

A deed was accordingly made by the defendant to the plaintiff on the 15th of June, 1877, which conveys the property subject to the payment of the mortgage to the Building Society "on which \$664 is yet unpaid,"

and the defendant covenants that he had not incumbered save as aforesaid, and for the difference the plaintiff gave her mortgage to the defendant.

The plaintiff ascertained after this that upon the mortgage to the Building Society there remained seventy-one payments of \$16.75 each to be made, which would amount to \$1,189.25, and claims that the defendant should pay her the difference between \$664 and that sum, or \$525.25.

The defendant contends that the cash value of the mortgage to the Building Society, at the date of the contract, should be calculated, and that amount only deducted from the purchase money.

And in this contention I think he is correct. It is the only mode of placing the transaction on a cash basis, and of ascertaining how much was to be deducted for the mortgage. If the face amount of the mortgage be deducted, the plaintiff enjoys the advantage of retaining in her hands the amount of the accruing instalments till they fall due, an advantage that can properly be estimated by interest upon these payments, while the defendant suffers a proportionate loss. The plaintiff is in fact only to retain in her hands such a sum as with interest upon it will meet the accruing payments.

A difficulty arises in considering at what rate of interest the cash value is to be ascertained. If the society will accept payment of the mortgage now, the rate of interest should be that payable to the society,—between $10\frac{1}{2}$ and 11 per cent. If the society will not accept payment of their mortgage before it matures, the rate might either be such as money could have been invested at on the date of the contract, 31st May, 1877, or the legal rate of 6 per cent. The former could only be ascertained by a reference, and considering the expensiveness of such a proceeding, and the uncertainty of its result, it seems to me the preferable mode to fix the rate at once at 6 per cent.

1881.

Stark
v.
Shepherd.

Judgment.

1881.

Stark
v.
Shepherd.

Judgment.

The defendant by his answer admits that by some mistake the present cash value of the payments at the society's rate of interest was stated at \$664, instead of \$888.28, and he offered to pay the difference, \$224.28, and costs of the suit up to the filing of the answer. If the society accept present payment, this seems the correct sum, and the plaintiff must pay costs subsequent to answer. If the society do not accept present payment, the cash value at 6 per cent. would be \$999.98, and the defendant must pay \$335 95, and the costs throughout. Whichever amount is to be paid, will have interest added from 31st May, 1877.

1881.

BANK OF MONTREAL V. HAFFNER.

Demurrer—Mechanics' Lien Act—Mortgagee—Owner.

The plaintiffs instituted proceedings to enforce a mechanic's lien assigned to them, which had been duly registered, and a suit thereon prosecuted. The plaintiffs claimed to be entitled to priority in respect of such lien over the claim of a mortgagee—whose mortgage was prior to the contract under which the lien arose—for the amount by which the selling value of the premises had been increased by the work and materials placed thereon. The assignee of the mortgagee demurred, on the ground that he was an owner of the land, within the meaning of the Act R. S. O. ch. 120, sec. 2, and that proceedings had not been taken against him within the time specified by the Act.

Held, that he was not such an owner, not being a person upon whose request or upon the credit of whom, &c., the work had been done.

Demurrer—under the circumstances stated in the judgment.

Mr. *W. Cassels*, for the defendant who demurs.

Mr. *Maclennan*, Q. C., contra.

PROUDFOOT, V. C.—The bill is filed by the assignees of a mechanic's lien. The claim for the lien was duly registered on the 17th October, 1879, and a suit commenced in this Court on 24th October, 1879, in proper time to enforce it. On the 21st April, 1880, the lien was assigned to the plaintiffs. And on the 8th of March, 1881, a decree was made declaring the mechanic entitled to the lien. October 19.
Judgment.

The defendants are the assignee in insolvency of the person who contracted with the mechanic for the performance of the work, and the representatives of a prior mortgagee, whose mortgage, dated 13th December, 1877, was prior to the contract for the performance of the work.

The bill claims priority over that prior mortgagee, to the amount by which the selling value of the lands has been increased by the work and materials of the mechanic.

1881.

Bank of
Montreal
v.
Haffner.

The defendant representing the prior mortgagee demurs for want of equity, and contends that under the Mechanics' Lien Act, the prior mortgagee was an owner of the land within the meaning of the Act, and that proceedings not having been taken against him within the time limited by the Act, the lien has ceased to exist.

The whole question then is, as to the meaning of the word "owner," in the Mechanics' Lien Act, R. S. O. ch. 120. In the 2nd section (Par. 3,) the term is defined as extending to and including a person having "any estate or interest, legal or equitable, in the lands upon or in respect of which the work is done * * * at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done."

The 7th section provides for giving the mechanic priority over a prior mortgagee to the extent that the property has been increased in value by his work.

A prior mortgagee, no doubt, has an estate legal or equitable in the premises, but something more than that is required to make him an *owner* within the definition; it must be a person having such estate, "at whose request and upon whose credit, &c., the work was done." There is no allegation of the kind in this bill, and nothing appears therefore to bring the defendant within the definition. If he desire to raise that question, he must answer.

The 16th section expressly provides that the lien may be assigned, thus putting an end to a question much disputed in the American Courts: *Phillips* on Mechanics' Liens, secs. 54, 55.

The American statutes, so far as I have been able to refer to them, contain no definition of the term *owner*, but the Courts have construed it to be the correlative of *contractor*, and to mean the person who employs the contractor, and for whom the work is done under the contract. (*Phillips*, *Ib.*, sec. 40.) Our statute seems

to have framed the definition in accordance with this course of decision.

1881.

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Montreal
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Haffner.

The demurrer is overruled with costs.

Defendants to have a fortnight to answer.

BURRITT V. BURRITT.

*Appeal from Master's report—Liability of co-trustees—
Foreign securities.*

A testator who, by his will, expressed the fullest confidence in *C.* (one of his trustees), directed them to be guided entirely by the judgment of *C.* as to the sale, disposal, and re-investment of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby. *C.* having made unauthorised investments of these moneys which proved worthless, the Master charged his co-trustee *B.* with the amount thereof.

Held, that even if at the suit of creditors *B.* might have been chargeable, yet as against legatees he was exonerated.

This was an appeal by the defendant, *Burritt*, from the report of the Master, on the ground that he had charged the defendant with a sum of \$51,000, which had been lost to the estate under the circumstances stated in the judgment. The testator in his will expressed unbounded confidence in the defendant *Case*, his brother-in-law, whom he had named as one of the trustees to carry out his will, and had thereby directed the other trustees to be guided by his views as to the disposition of certain American securities held by the testator at the time of his death. Statement.

Mr. *Boyd*, Q. C., for the appeal, referred to *Doyle v. Blake* (a); *Churchill v. Hobson* (b); *Lewin on Trusts*, 223, 230, 240.

Mr. *J. Hoskin*, Q. C. contra, referred to *Lewis v. Nobbs* (c).

(a) Sch. & Lef. at p. 239.

(b) 1 P. W. 241.

(c) L. R. 8 Ch. Div. 591.

1881. PROUDFOOT, V. C.—The defendant *Burritt* appeals

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February 8.

from the report of the Master, because the Master has charged him with the sum of \$51,000, which he joined with *Case*, another executor, in procuring from debtors to the estate: persons owing upon American securities mentioned in the will. The clause in the will is to be found in 27 Grant 145, by which the testator, expressing the fullest confidence in his brother-in-law and trustee *Case*, directed his trustees to be guided entirely by his judgment as to the sale, disposal, and reinvestment of his American securities, and declared that his trustees should not be responsible for any loss to be occasioned thereby.

Judgment.

At the hearing (27 Gr. 143,) the principal question was, whether *Case* had committed a breach of trust in making unauthorized investments, so as to justify the appointment of a receiver; and I thought he had. But that does not at all touch the present question, whether *Burritt* is to be held responsible for leaving the money in his hands.

The Master finds there are no creditors; the only persons who can, and who do, complain are legatees, and they are bound by the terms of the will. The will contains a very explicit direction to allow the American securities to be controlled by *Case* alone, and that the trustees should not be responsible for them. And I think *Burritt* was justified by the will in doing what he did here, enabling *Case* to receive the money for the purpose of reinvesting.

Doyle v. Blake (a) contains an expression of Lord *Redesdale's* opinion, that, under similar circumstances, the trustees would not be liable. The testator appointed the defendants *Blake* and *Athey*, along with his brother-in-law, *Horan*, his executors; and he directed his executors to turn all his property into cash, and deposit the same with his brother-in-law, *Horan*, whom he appointed trustee for the purposes

(a) 2 Sch. & Lef. 239.

therein declared, who was to place them out at interest on sufficient security. Lord *Redesdale* says: "Legatees are bound by the terms of the will, creditors are not so; and therefore in many cases executors would be discharged as against legatees though not as against creditors. For example, in the present case, if these gentlemen had collected the effects, and had paid the amount to *Horan*, still if a creditor had remained unpaid, he might have charged them upon the insolvency of *Horan*: whereas in the case of a legatee the executors might justify themselves by the direction in the will."

1881.

Burritt
v.
Burritt.

Judgment

The appeal is allowed. The costs of all parties will be paid out of the estate.

1881.

RODY V. RODY.

Dower—Election—Widow—Lease of lands.

A testator, amongst other things, made certain bequests in favour of his widow, and directed that his farm, the only real estate he possessed, should be leased to two of his three brothers named as executors until such time as his nephew and son attained twenty-one.

Held, that, under these circumstances, the widow was bound to elect between her dower and the benefits given by the will.

This was a suit for the construction of the will of the late *Frederick Rody* and administration of his estate; and came on by way of motion for decree.

Mr. *J. C. Hamilton*, for the plaintiff.

Mr. *Langton* and Mr. *Plumb*, for the infant defendants.

Mr. *H. Cassels*, for the executors.

Parker v. Sowerby (a); *Gibson v. Gibson* (b); *Patrick v. Shaver* (c); *Laidlaw v. Jackes* (d); *McLellan v. McLellan* (e); *Fairweather v. Archibald* (f); *Hall v. Hill* (g); *Arnold v. Kempstead* (h); *Davidson v. Boomer* (i); *Young v. Derenzy* (j); *Jarman on Wills* (ed. 1861), p. 433 were referred to.

March 11. PROUDFOOT, J.—The only question undisposed of in this case was, whether the widow was bound to elect between her dower and the benefits given to her by the will.

(a) 4 D. M. & G. 321.

(c) 21 Gr. 123.

(e) Ante. p. 1.

(g) 1 Dr. & War. 94.

(i) 15 Gr. 1, 218.

(b) 1 Drew. 42.

(d) 25 Gr. 293; 27 Gr. 101.

(f) 15 Gr. 255.

(h) 2 Ed. 236.

(j) 26 Gr. 509.

Without referring to all the provisions of the will, there is one that in my opinion decides this question. The testator appointed three of his brothers executors of his will, and directed that his farm, the only real estate he died possessed of, should be leased to two of these executors, until his nephew *Jacob Rody* attained 21 years, and until his son *Joseph* attained 21 years, at the rent of \$50 per annum. This is either a power to lease given to the executors, where it is clear that the widow must elect, or it is a direct bequest of a leasehold interest to his brothers. In the latter case, I see no reason why the legatee should not take as extensive an interest as he would by taking a lease under a power.

1881.

Rody
v.
Rody.

Judgment.

My opinion is, that the widow must elect; and she, by her counsel, having consented to elect, if I was of that opinion, declare accordingly. Usual administration decree. Reference to *Walkerton*.

1881.

HAWKINS v. MAHAFFY.

Riparian proprietor—Reservation in Crown patent—Easement—Scientific evidence.

The patent from the Crown of a lot of land situate on the bank of a river, reserved free access to the bank for all persons, vessels, &c. There was a quantity of stone on the lot, which the plaintiff desired to quarry, but was prevented by the penning back of the water of the river by the defendant, the owner of a mill thereon below the plaintiff's land.

Held, that the reservation by the Crown in the grant was merely an easement to the public, notwithstanding which the plaintiff was a riparian proprietor, and as such entitled to complain of the injury caused by the penning back of the water.

The parties desired the assistance of scientific evidence as to the height of the defendant's dam and the effect of raising it. The Court (PROUDFOOT, J.) appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained.

Examination of witnesses and hearing at the Sittings at Goderich, in the Autumn of 1881. The facts of the case and the points relied on are stated in the judgment.

Mr. *M. C. Cameron*, for the plaintiff.

Mr. *Garrow*, for the defendant.

March 21.

PROUDFOOT, J.—The plaintiff purchased lot two, on the south side of Melbourne street, in the village of Port Albert, some months before April, 1878. In the original grant from the Crown made to one *William Spragge*, on the 26th April, 1843, there was a reservation of free access to the bank of the Nine Mile River, for all vessels, boats and persons. Lot two is situate on the bank of the river. There is a large quantity of stone for quarrying purposes on it, which the plaintiff desires to utilize.

Judgment.

Down the stream from the plaintiff's land the defendant purchased on the 27th October, 1876, certain mills, and part of the mill reserve, the description of which carries it to within about thirty feet of the lower

boundary of plaintiff's land. For many years there had been a dam to supply the mills with water, which it is alleged penned back the water only within the boundary of the land now owned by the defendant. About two years since the defendant increased the height of the dam, as he admits, by about a foot, but as the plaintiff charges by about two and one-half feet, and which the defendant says does not back the water on the plaintiff's land, and the plaintiff says it has the effect of penning back the water on him, so as to overflow a considerable portion of his land, and prevents him from quarrying his stone, or using his land, as he otherwise would. The plaintiff insists on his right to quarry in the bed of the stream to its middle line.

1881.
 Hawkins
 v.
 Mahaffy.

The defendant, among other objections to the plaintiff's right to recover, denies that he is a riparian proprietor, contending that the reservation in the deed of a right of access to the bank gives a right of way, and that this intervening between the plaintiff and the stream prevents him from claiming to the middle of the stream, or indeed to the water's edge.

Judgment.

This is not a valid objection; all that is reserved is an easement, and while securing to the public the right of approach, there is nothing to shew that the property did not pass.

In *Cockburn v. Eager* (a), the road that intervened was expressly reserved, as well as access to the shore. The land of the defendant only ran to the road allowance, and did not reach the water.

In *Kirchhoffer Stanbury* (b), the reservation was of the waters of the River Trent, together with free access, &c., and the Chancellor says that it would probably operate as a reservation of the bed of the river.

Neither these cases, nor anything said in *Robertson v. Watson* (c), nor in the other cases referred to, appears to me to prevent the plaintiff being considered

(a) 24 Gr. 409.

(b) 25 Gr. 443.

(c) 27 C. P. 594.

1881.

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Mahaffy.

a riparian proprietor, and carrying his land to the centre of the stream.

As to the other question, whether the defendant has by increasing the height of the dam penned the water back on the plaintiff, a great deal of evidence, some of it as usual in such cases very contradictory, was given. At the hearing I was strongly impressed with the conviction that the evidence did establish that the effect of the present dam is to raise the water at the lower boundary of the plaintiff's land more than two feet, and that it was a considerable distance up stream, in front of the plaintiff's land, before the rise was lost in the fall of the river. I have since referred to my notes of the evidence, and it has rather tended to confirm my first impression. If any uncertainty still hangs about it, the defendant has himself in a great measure to blame, as he refused to lower the water to permit the plaintiff's engineers to observe the precise effect of the new dam. He now professes his readiness to do this, if I am not satisfied on the evidence that the present dam does not raise the water higher than *Crawford*, the previous owner, was justified in raising it, or does not raise it to a point beyond the limit of the mill reserve, and to have the levels taken by a disinterested engineer appointed by the Court.

As the evidence is contradictory, and as the question is one of vital importance to the defendant, I think it would be proper to accede to this offer. The engineer to observe the effect of the present dam, then the effect when the water is lowered by the foot the defendant admits to have raised the dam; and then the effect when lowered to the height of the former dam, as sworn to by the plaintiff's witnesses, viz: the bottom of the mortice in the post on the south-east corner of the saw mill, that received the cross piece on the top of the old dam, and if Mr. *Unwin* will accept the duty I nominate him to take the levels.

As this might have been avoided by the defendant

permitting the dam to be lowered for the inspection of the plaintiff's engineers, he must pay the costs of it. 1881.

The parties will probably agree as to the time for the engineer to take the levels, which should be done in the presence of both parties; if they cannot, I will appoint a time for the purpose.

The case can be mentioned again when the engineer shall have reported.

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v.
Mahaffy.

STEWART V. GESNER.

Will, construction of—Mortmain—Mechanic's lien.

A will contained this clause:—"I will and desire that the residue of my real and personal estate, being the sum of \$2,800, more or less, shall be paid to the four Churches of England, in the townships of Orford and Howard, in four equal parts to each such churches as follows: To Trinity Church, Howard; St. John's Church, Morpeth; St.— Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively; and in case of no debt, or there being a balance or residue after the payment of such debt or debts on each of such churches, respectively, then the residue, (if any) is to be paid by my executors to the churchwardens of such church, to be held by them in trust; and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the Incumbent of said church as a portion of his salary or stipend."

Upon a special case stated for the opinion of the Court, it was shewn that there was a large debt existing on the Morpeth Church for money borrowed on mortgage wherewith to pay off the building debt. The church at Clearville was not built at the time of the testator's death, but some debts were existing in respect of materials and work on the foundation.

Held, (1) that the mortgage debt on the Morpeth Church could not be considered as a building debt; but if it could be so considered the bequest to pay the same would be void, under the statutes of Mortmain. (2) That as to the Clearville Church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics' Lien Act, and the bequest to pay off those debts would therefore be void, unless the work was being performed in such a manner as excluded

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the creation of a lien on the land. (3) That the bequest for the benefit of the Incumbent would have been void if the investment had been directed to be made upon realty; but as the trust might be carried out by investing on personalty the bequest was valid if so invested. (4) That the amount to which the Incumbent would be entitled was the residue after deducting the void bequests for debts.

This was a special case submitted for the opinion of the Court upon certain questions arising on the will of *John Stewart*, deceased, which are clearly stated in the judgment.

Mr. *W. Cassels*, for the plaintiffs.

Mr. *J. Hoskin*, Q.C., for the defendants, the Churches.

Mr. *C. R. Atkinson*, for the Trustees.

Corbyn v. French (a); *Foy v. Foy* (b); *Pritchard v. Arbouin* (c); *Smith v. Oliver* (d); *Giblett v. Hobson* (e), were referred to.

October 10.

PROUDFOOT, J.—The opinion of the Court is asked upon several questions arising out of the will of *John Stewart*.

The testator died 10th April, 1880, having made his will on the 1st day of the same month, by which he devised to his executors all his real and personal estate of which he might die possessed, with power to sell, &c.; to hold upon trust for payment of a number of legacies, which are not now in question, and then proceeded as follows:

“ I will and devise that the residue of my real and personal estate, being about the sum of \$2,800, more or less, shall be paid to the four churches of England, in the townships of Orford and Howard, in four equal parts to each of such churches as follows: To Trinity Church, Howard; St. John’s Church, Morpeth; St.

(a) 4 Ves. 418.

(b) 1 Cox 163.

(c) 3 Russ 458.

(d) 11 Beav. 481.

(e) 3 M. & K. 517.

———— Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively, and in case of no debt or there being a balance or residue after the payment of such debt or debts on each of such churches respectively, then the residue (if any), is to be paid by my executors to the churchwardens of such church, to be held by them in trust; and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the incumbent of said church, as a portion of his salary or stipend.”

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There is a large debt on St. John's Church, for money borrowed to pay off debts contracted and due for the erection and building of the church, and it is secured by mortgage on the Church, but it does not appear whether the mortgage was made before or after the death of the testator.

The Church in Clearville was not built at the time of the death of the testator, though debts had been contracted for materials for the same, and on work for the foundation of it. Judgment.

It was contended that the debt upon St. John's having been paid off by the money raised on the mortgage, the mortgage debt could not be considered a debt incurred in building.

It was also contended that the bequest to the Clearville Church was void, the building not having been constructed at the time of the testator's death; and that all the bequests to the churches were void under the Statutes of Mortmain.

If these are bequests in Mortmain, no doubt the bequests of the proceeds of realty, or money savoring of the realty, or of money to be invested in land, are void.

As to the bequests to pay off the debts on the churches. It has been held that the bequest of a sum of money for the erection of buildings on land which

1881. is already devoted to charitable purposes, or in the repair and improvement of buildings appropriated to charity, is valid. (*Jarman on Wills*, 216). Yet, singularly enough, it seems to have been also held that a legacy to be applied in the liquidation of a subsisting incumbrance on real estate, already subject to charitable uses, does not come within the principle, and is void. (*Ib.*) But where the debts are not a lien on the house, a bequest to the debtor to enable him to pay them is valid. (*Ib. n (r)*)

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I am unable to distinguish, in principle, a bequest to erect a house on lands already in Mortmain, and a bequest to pay off debts incurred in making such erection; the effect of both is the same, to bring additional land into Mortmain. The erection of a church costing, say, £10,000, upon land already in Mortmain, is practically placing land of the additional value of £10,000 in Mortmain. The payment of a mortgage already existing on the church to the same amount, would not have any greater effect. But it has been decided that a distinction exists, and I am bound to act upon it: *Corbyn v. French (a)*, *Tudor's Leading Cases*, 519.

Judgment.

It was said that the validity of the bequest to St. John's Church depended upon the question whether the mortgage was given before or after the testator's death. Of course, if it was before, it would be clearly bad. The same must be the decision, if after. For the debt then in existence on the church had been paid off; and I do not think a mortgage given afterwards to secure money borrowed to pay off the debts, can be considered a debt incurred in building. Or if it can be so considered, then when the money comes to be applied it is a charge upon the property, and directly within the cases prohibiting the discharge of such debts. I have not found any case deciding that the validity of a bequest for the payment of such debts

(a) 4 Ves. 418.

depends upon the fact of there being no lien for them at the testator's death. And it would seem that the policy of the Mortmain Act would be equally infringed if the lien existed at the time of the application of the money, as if it existed at the testator's death. It is in both cases bringing land into Mortmain. Again, the building debts having been paid the object of the testator is advanced. It does not appear that he intended it for the general benefit of the churches, but for the special purpose he has indicated. If the mortgage is to be considered the equivalent of the debts, then the security on the land must go with them, and be treated as existing at the time of the devise. Independently of the mortgage, however, it might be that the debts constituted a lien under the Mechanics' Lien Act, R. S. O., ch. 120; on this the case is silent.

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The same remarks apply to the proposed church at Clearville. It is a bequest to pay off debts on a church then in course of erection. It is not a bequest to erect a church, but to pay debts incurred in the course of erection; and it is clear that under the Statute cited above, in the absence of agreement, these debts are a lien from the beginning of the work, and must have been a lien, so far as the work had then advanced, at the testator's death, and the lien would arise on the new work as it was performed. Judgment.

Both these bequests are void in my opinion, as tending to appropriate to the charity an increased interest in land, except that if the work on the Clearville Church has been or is being performed so as to form no lien, it will be valid.

The case says nothing as to any debts existing on Highgate Church.

The testator directs that in case of there being no debts on these churches, or there being a balance or residue after payment of the debts, then the residue is to be paid by his executors to the churchwardens and invested by them, and the interest paid to the incumbent.

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The bequest for the benefit of the incumbent is a charity (a), and so far as the fund consists of realty or the proceeds of realty, it is void; if of personalty, it is good, unless affected by the direction to invest, or by its taking effect after the bequest of an indefinite use under the Mortmain Act. The will does not specify the nature of the investment.

If it had required or recommended an investment in real securities, it would have been void. But it seems that in all cases where the trust *may* be carried out without contravening the statute, the bequest is valid (b).

Judgment.

Here, the trustees have the power to invest in such a way as not to violate the statute, and the bequest is therefore good. If they should invest in improper securities, the legal application could be compelled. In one case, *Carter v. Green* (c), Sir *W. Page Wood* coupled the declaration of the validity of the bequest with a further declaration that the application of the fund in purchasing land would be illegal. But in *Baldwin v. Baldwin* (d), the Master of the Rolls refused to make any such declaration. As, however, if no declaration is made, it might be necessary to file an information by the Attorney-General, I think it would be better to adopt the mode used in *Carter v. Green*, so that if necessary applications may be made in the present suit.

It may be said, however, that the bequest to the incumbents is void as only to take effect after the employment of an indefinite sum for an object within the Mortmain Act. But that is because the Court cannot ascertain what the amount of the void bequest is. See the cases cited in notes to *Corbyn v. French—Tudor's* Leading Cases, 559. Here the debts can be ascertained, and to that extent the bequest is void; *Attorney-General v. Lord Weymouth* (f); *Hopkinson v. Ellis* (g).

(a) 4 Ves. 418.

(c) 3 K. & J. 591.

(r) Amb. 29.

(b) 1 Jarm. 193.

(d) 22 Beav. 419.

(g) 10 Beav. 169.

The bequest to the incumbents is, in case there be no debts, or there being a residue after payment of debts; it is not therefore a legacy substituted for the illegal one, which might be valid : *Attorney-General v. Tyn-dall* (a). But it is to take effect after payment of the sums for debts.

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The amount bequeathed to the incumbents is, therefore, the residue of personalty after deducting the void bequest for debts.

There will be a declaration that the bequests for payment of the debts of St. John's and Clearville Churches, so far as they form a lien on the property, are void; and also any debt on the Highgate Church forming a lien on the Church or its site. That all the bequests so far as they consist of the proceeds of realty, or of money savouring of realty, are void. That the bequest to the churchwardens for the benefit of the incumbents is valid, to the extent of the pure personalty after deducting the amount of the void bequest for debts on the churches, and that the application of that bequest or any portion of it in the purchase of land or in investments on real securities, will be illegal.

Judgment.

Costs of all parties out of estate.

(a) 2 Eden, 207, 214 ; Tudor's L. C. 566.

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Dalby
v.
Bell.

DALBY V. BELL.

Consent decree—Mistake of parties—Costs.

A decree had been made on consent, referring to the Master the question whether or not the defendant had performed certain work for the the Court (*Blake*, V. C.) considering that this was a question that plaintiff at a specified rate, who reported that he had not. On appeal, should have been disposed of by the Court, set aside the report and directed a trial to be had upon that issue, reserving the costs of the proceedings before the Master and of the appeal.

Held, on further directions, that these costs having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should bear his own costs.

The plaintiff filed his Bill to enforce a Mechanic's Lien, registered, for the purpose of recovering the balance due for the erection of an hotel on the defendant's property.

Statement.

The defendant pleaded that the hotel had been erected under contract for a fixed price which was less than the amount claimed by the plaintiff, even after giving credit for money paid on account.

The cause came on for hearing and examination of witnesses at Simcoe, and by consent of counsel for both parties the Court referred all the matters in dispute to the Master at Simcoe. The Master found that there was no fixed contract price, and awarded to the plaintiff the full balance claimed by him.

Upon appeal from the Master's report Vice-Chancellor *Blake* held that the matter in dispute was not a proper subject of reference to the Master, and set aside the decree and report; and directed a new hearing, reserving the costs of the former hearing and the proceedings taken in the Master's office. At the new hearing the Court found that there was a fixed contract price, and referred the cause to the Master to take the accounts reserving further directions and all costs. The cause now came on for hearing on further directions and as to the question of costs.

Mr. *Moss*, Q. C., for the plaintiff.

Mr. *W. Cassels*, for the defendant.

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PROUDFOOT, J.—At the hearing before *Blake*, V. C., the chief, in fact the only, question was, whether the work was done under a contract for a specific sum, or upon a contract to receive a *quantum meruit*. And on this point the defendant was successful. I have referred to the Vice-Chancellor's note of the case, but am unable to ascertain from it the reason for reserving the costs of the hearing. *Primâ facie* the defendant should have them; and, in the absence of any countervailing reason, the *primâ facie* right should govern.

21st Dec.

The costs of the appeal by the defendant from the Master's report, heard by *Blake*, V. C., seem to be on a different footing. The original decree was made by consent, and referred it to the Master to ascertain whether the work was done under a contract for a specified price or not. The Master reported that it was not so done. The defendant appealed, and when the appeal came on to be argued, the Vice-Chancellor thought that this question should have been decided by the Court, and not referred to the Master; and he set aside the report and directed a trial to be had before a Judge of the Court, and reserved the costs of the proceedings before the Master and of the appeal.

Judgment.

These costs, therefore, were incurred in a proceeding consented to by both parties, under a common mistake as to the proper tribunal to dispose of it. Under such circumstances, I do not think either party ought to pay the expense of it.

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White.

NELLES V. WHITE.

Tax sale—Assessment, validity of—Description—Certificate of sale, effect of—Possession fraudulently obtained.

The north part of a lot, called lot 1 in one survey and lot 4 in another, of 100 acres more or less, was assessed variously as “number 1, N. half,” &c. “Number 1, N. part,” &c. N. half lot number 1,” &c., and “broken lots 1 and 4.” The collector’s roll shewed similar discrepancies.

Held, that, though these irregularities indicated want of care and accuracy in the officers of the Municipality, they did not invalidate the assessment, as the land was sufficiently pointed out. *McKay v. Crysler*, 3 S. C. R. 436, distinguished.

Held, also, that the words “be the same more or less,” following the description of the quantity of land, improperly inserted in the sheriff’s deed, might be rejected as surplusage.

A sheriff’s certificate of sale for taxes is made for the purpose of giving the purchaser certain rights, in order to the protection of the property, until it is redeemed or becomes his absolutely, and forms no part of his title. The description in it being defective does not invalidate the sheriff’s deed, nor *Semble*, would its absence.

The plaintiff was assignee in insolvency of *H.*, who bought from the purchaser at the sheriff’s sale. *H.* leased to *T.* and put him in possession, and had some small buildings put on the land. Subsequently, the defendant *O.* made untrue representations to *T.*, which induced him to quit possession, whereupon *O.* went in and occupied, claiming under defendant *W.*, who, he alleged, had an interest in the land. *W.* by his answer adopted *O.*’s possession and claimed under conveyance from the Crown, but failed to prove his title.

Held, following *Doe Johnson v. Baytup*, 3 A. & E. 188, that the possession so fraudulently obtained by *O.* did not entitle him to put the plaintiff upon proof of his title.

Quere, whether since 36 Vic. ch. 36, and preceding statutes, when some taxes are in arrear, but a sale has been made for more, the defect is cured.

This was a suit instituted by *Henry E. Nelles*, assignee in insolvency of the estate and effects of *John Hargreaves*, against *Solomon White* and *James O’Neil*, the bill in which set forth that the said insolvent had, in 1867, become owner in fee of the north 100 acres of lot one, in the tenth concession of Colchester, and of

the south thirty acres of the same lot in 1876, and so continued until September, 1879, when he conveyed the same to his wife *Catherine E. Hargreaves*, which conveyance was subsequently and on the 12th of October, 1880, set aside, and the whole of the lot declared vested in the plaintiff as such assignee, and the same continued so vested in the plaintiff.

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The bill further stated that *Hargreaves* had continued in possession thereof until October, 1880, when the land became unoccupied, and thereupon the defendant *White*, without colour of right, put the defendant *O'Neil* into possession, who continued to reside and hold possession thereof as tenant or agent of *White*, and they the defendants refused to deliver up possession to the plaintiff: that *White* claimed to have some interest in part of the land, which the plaintiff disputed, and if he (*White*) ever had any claim thereto it had been barred by the Statute of Limitations.

The bill charged that the defendants being in possession had cut down and removed divers valuable timber and other trees growing on the said lands; and prayed an injunction to restrain further acts of trespass, an account, and further relief.

Statement.

The defendants severally answered, setting up that *Hargreaves* acquired title under a sale for taxes which they alleged to have been illegal, and the title acquired thereunder invalid.

Thereupon the plaintiff amended his bill by introducing the following clauses:

5 a. "The defendants contend that the title of the said *Hargreaves* was founded upon a sale of the said lands for taxes, and the said defendants contend that the said sale is and was invalid for the reasons alleged in the said answer. Your complainant shews, and the fact is, that all proper proceedings were had and steps taken and things done required by the statutes in that behalf, and that the said sale (which took place in 1860) was and is valid.

5 b. "Your complainant also alleges, and the fact is, that since the said sale the purchaser at the said sale, and his assignees and the said *Hargreaves*, were and have been in continuous occupation of the said lands, and have paid the taxes continuously to the present

1881. time, and your complainant pleads the various statutes relating to sales of lands for taxes and curing defects in such sales as a bar to the defences raised by the said answer.

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5 c. "Your complainant pleads the various Statutes of Limitations as a bar to any defence.

5 d. The title to the said land is a registered one, and your complainant and those through whom he claims had no knowledge or notice of any title of the defendants, and your complainant pleads the Registry laws.

5 e. "Since the said sale the said purchaser at said sale and his said assignees and the said *Hargreaves*, the said purchaser, and his said assignees have paid the taxes and made large and valuable lasting improvements. Your complainant submits that in the event of your complainant's title being defective (which your complainant does not admit,) your complainant is entitled to a lien on the said lands for the said taxes so paid and interest at ten per cent., and for said improvements.

5 f. "The defendant *White* claims by a devise to one *Duchesneau*, and by a conveyance from the sheriff, and by a sale of said lands for taxes to one *Labadie*, but the plaintiff alleges that the said devise and sheriff's sale and tax sale were and are invalid and void, and that the defendant *White* never gave any value or consideration for the said land, and had actual notice at and before the said sheriff's sale of the plaintiff's title, and had then full knowledge of all the rights of the plaintiff in respect of the said lands,"

Statement.

And also amended the prayer by adding that in the event of the plaintiff's title proving defective, the plaintiff might be declared entitled to a lien on the said lands and premises for the value of improvements made, and the taxes paid thereon, with interest.

The cause having been put at issue, was brought on for the examination of witnesses and hearing at the Sittings at Sandwich in the spring of 1881.

The other facts appear in the judgment.

Mr. *Boyd*, Q. C., and Mr. *Kew*, for the plaintiff.

Mr. *Gibbons* for the defendants.

The points mainly relied on by the defendants were (1) that the lands had not been properly assessed, and were not sufficiently described either in the assessments, the warrant of the treasurer directing the sale, the advertisement of sale, the certificate of sale, or the deed

made in pursuance of such sale ; and that the taxes in arrear at the time of such sale were not so in arrear for such a length of time as rendered the lands liable to be sold therefor.

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They also insisted that they had shewn a good title in themselves ; and even if that were not strictly proved they, at all events, were in peaceable possession, and being so they were not called upon to shew more than a possessory right until the plaintiff had established some title, which they contended he had failed to do.

The plaintiff referred to *McKay v. Crysler (a)*, *Bank of Toronto v. Fanning (b)*, and insisted that the title obtained in 1881 under the tax sale was sufficient to protect him against any claim of the defendants, who, if they ever had any title to the lands in question, were now barred by the Statute of Limitations from setting it up.

SPRAGGE, C.—A principal question in this case is whether a sheriff's sale for taxes of the 100 acres of land in question, made on the 15th day of March, 1860 can now be impeached as invalid.

The plaintiff claims under the tax sale. The defendant having, as the plaintiff alleges, wrongfully obtained possession in June, 1880.

The defendant in his answer states the proper description of the property in question to be "100 acres more or less, being composed of the North part of lot number 1, in the 10th concession (according to the survey of *Mahlon Burwell*, deputy provincial land surveyor) otherwise number 4 in the 10th concession (according to a diagram returned by *Thomas Smith*, deputy provincial land surveyor,) of said township of Colchester," and this description appears to be correct.

The crown patent for the above parcel issued 3rd April, 1836. The lot contains in all 130 acres or there-

(a) 3 S. C. R. 474.

(b) 18 Gr. 391.

1881. about, the 30 acres lying south of the 100 acres, and the patent for the 30 acres did not issue till 14th June, 1876. The 30 acres are not in question.

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It is objected that the 100 acres were not regularly assessed. It is assessed in the first book in the treasurer's office as Number one, N. half, tenth concession, 100 acres; in the second book in the same way except that "N. part" is put in place of N. half. In the third book it appears thus in ink "N. half lot number one, tenth concession, 100 acres, patented," and over the words "N. half" the words "N. part" are put in pencil, and over the word "patented" the words "patented 1837" are put in pencil. In the fourth book the entry is tenth concession broken lots 1 and 4, 100 acres. The entries in the treasurer's books from 1853 to 1857 both inclusive are the same, and for 1858 the entry is tenth concession broken lot 1, 100 acres, the same as in fourth book, with the pen run through the word and figure "and 4."

Judgment. In the collector's roll the entries vary, thus: 1, 4, 1 and 4, 1 and part 4, part 1 and 4, 1 4, 1 and 4 100 acres, in one place 150 acres.

These are irregularities and indicate want of care and accuracy in the officers of the municipality, but in my opinion they do not make the assessment invalid. Two surveyors speak of this lot being known as lot 1 and 4, being lot 1 by one surveyor and 4 by another, and one of them says he would call it a broken lot.

What was intended to be assessed and what was really assessed was the patented north 100 acres of a lot known as lot 1 and 4. The chief inaccuracies are in the collector's rolls and cannot vitiate the assessments. The entries in the treasurer's books taken from the assessment rolls shew only trivial inaccuracies, and such as are not misleading.

I cannot do better upon this point than refer to the judgment of Mr. Justice *Gwynne*, in *McKay v. Crysler*

(a), and the Provincial Statutes to which the learned Judge refers, and to the bank of *Toronto v. Fanning* (b), in appeal.

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The Act of 1866, 29 & 30 Vict. c. 53 limits the time for questioning sales of taxes to four years, and the Act of 1869, 32 Vict. c. 36 reducing the time of limitation to two years are referred to in most of those cases as well as in *McKay v. Crysler* (c). In none of the cases have inaccuracies such as appear in this case been held to invalidate a sale where a sheriff's deed has been made and the statutory period of limitation has expired. In *McKay v. Crysler* the imperfect and ambiguous entries were held material because they did not afford satisfactory evidence of the taxes being in arrear for which the land was sold.

I agree that the land must be assessed, and with sufficient definiteness to shew what land is assessed, and I think that in the case before me this has been done.

The evidence shews that at the sheriff's sale it was explained what land it was that was put up to sale, and it appears to have been explained correctly. Then we have the deed from the sheriff of the 18th March, 1861, in which the land is described as composed of the North part of lot number one in the tenth concession, * * containing 100 acres be the same more or less. These words "be the same more or less" should not be in the deed, but they may be rejected as surplusage; see *Crysler v. McKay* (d). There could be no want of distinctness as to what was actually sold, for the whole North 100 acres was put up and, no one offering to pay the taxes for a less quantity, the whole was knocked down to the purchaser, this case differing in that respect from the cases cited upon that point by the defendants' counsel.

Judgment

(a) 3 S. C. R. 436.

(b) 18 Gr. 391.

(c) 3 S. C. R. at 474. *et seq.*

(d) 3 A. R. 436.

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But it is objected that the sheriff's certificate is indefinite. He certifies "I have levied on broken part of lot number one and four in the tenth concession of the township of Colchester, the sum of twenty eight dollars and four cents, the amount of assessments due thereon together with my fees, by a *sale of the same* to *John Godbold*, he being the lowest bidder at the public sale thereof: that is to say, commencing at the front angle at the limit between said lot number and lot number thence along said limit. A more full description to be given after examining recording office &c., *containing one hundred acres.*"

I confess that this description is unintelligible to me. The diagram of the lot which is before me does not shew the north 100 acres of the lot to be a broken part of the lot; that term is more applicable to the south thirty acres. Then the intended description by metes and bounds has two blanks, leaving only the place of commencement, which is stated to be "at the front angle at the limit between said lot number and lot number thence along said limit." The words "said lot" can only refer to the lot mentioned called one and four, but the front angle of that lot is part of the thirty acres not of the 100, and is not between that and any other lot, but between that lot and a road. The only angle that would answer the description, and be a part of the 100 acres, would be at the limit between lot 1 4 and the adjoining lot on the east in the same concession. In no part of the description is the north 100 acres or the north part of the lot mentioned. So far as any land is described it is the south 100 acres, not the north.

If therefore the certificate formed part of the purchaser's title, his title would be defective; but I do not find any case in which it has been adjudged that it does. It is made the duty of the sheriff to give a certificate, but the purpose of the certificate being given and its office and legal effect are to give the purchaser certain

rights in order to the protection of the property in the meantime, until it is redeemed or becomes his absolutely, and I incline to think that the absence of a certificate does not invalidate the deed. The time for redemption and the time at which the purchaser becomes entitled to his deed are both computed from the day of sale; and no effect is given to the certificate except that which I have stated.

But there is another difficulty in the way of sustaining this sale, and to my mind a more serious one. Evidence was given by *Charles F. Labadie* of payment of taxes by himself as then owner of the land for 1854 and 5, and doubtfully for 1853. It was suggested by *Mr. Boyd*, for the plaintiff, that if in arrear for 1853 such arrear would warrant the sale, although they may have been paid regularly afterwards up to the sale; and to this I agreed. But upon looking at the entries in the treasurer's books I find that the sale was for taxes in arrear not only for 1853, but for 1854, 5, 6, 7, and 8. The entries in the treasurer's books shew no payments of taxes for any of those years, and are evidence *prima facie* of no taxes having been paid for those years; but it must be open to the owner of land to prove that the taxes have been actually paid, and this was done in *Hamilton v. Eggleton (e)*—in that case by more satisfactory evidence viz., by production of the treasurer's receipts for taxes. In that case it was proved that there was no arrear of taxes whatever; and it was held that the defect was not cured by 36 Vict. ch. 36, O. It has not been decided, I believe, since that statute or the two statutes on the subject preceding it, that when there have been some taxes in arrear, but the sale has been for more taxes than are in arrear, the defect is cured. But in several of the cases decided since these statutes the import of the language of the Judges has been that they apply only to matter of procedure. Individually

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v.
White.

Judgment.

(e) 22 C. P. 536.

1881. I should incline to think that where taxes are shewn to have been in arrear for a sufficient time to warrant a sale, a sale would not be invalidated by reason only of its being for a larger arrear of taxes than was really due.

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But however that may be, there is a point upon which the plaintiff is in my judgment entitled to succeed.

The plaintiff is assignee in insolvency of one *Hargreaves* who derived title from the purchaser at sheriff's sale, and who paid his purchase money, \$1,000, without notice as he swears, and as I believe, of any defect or any infirmity of title in relation to the sale for taxes. In 1872 he put one *Thompson* in possession, and had a shanty and stable put up, and afterwards in 1878 gave him a lease for four years from 1st April, 1878, and had about eight acres cleared and fenced. In June, 1880, *Hargreaves* having become insolvent, the defendant *O'Neil* went to the place and represented to *Thompson* that *Hargreaves* having become insolvent, *Thompson's* chattels upon the place would or might be seized, and *Thompson* becoming alarmed removed his chattels and himself and left the place, and *O'Neil* moved into the place. He did so, claiming that the defendant *White* had an interest in the place, and that he was there for him.

Judgment.

White by his answer claims title to the 100 acres by a chain of title from the patentee of the Crown, which however he fails to prove. As to the possession obtained by *O'Neil* he says that "the persons then and first in possession gave up about a year ago possession of the same to my co-defendant *O'Neil*, who has since remained in possession for me." He therefore adopts the possession obtained by *O'Neil* under the circumstances that I have stated, and if possession so obtained could not be retained by *O'Neil* so neither can it be retained by *White*.

Looking at all the circumstances I think it a proper

conclusion from the evidence that *O'Neil* made the representation that he did to *Thompson* in order to frighten him from the place; and his representation produced that effect. The representation was untrue, and there was a legal if not a moral fraud in making it, and the possession so obtained was a possession fraudulently obtained.

The case is within the principle of *Doe Johnson v. Baytop* (*d*), where possession was obtained from a caretaker through a trick; and it was held by the full Court Lord *Denman* and *Littledale*, *Patteson*, and *Coleridge*, JJ., that possession so obtained did not entitle the party obtaining it to put the party from whom it was obtained upon proof of title. It is put shortly thus, by Mr. Justice *Littledale*, "Possession having been fraudulently obtained, if the title is to be disputed the lessor of the plaintiff may insist upon being first put into the situation in which she was before the possession was taken."

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White.

Judgment.

The plaintiff claims this by his bill, while he relies also upon his tax sale title, and he is by his bill in the position of a plaintiff in ejectment.

The defendants *O'Neil*, as it appears, by the authority of *White*, have cut a considerable number of trees upon the place and have damaged it to the extent, as *Thompson* estimates it, of \$300. The plaintiff is entitled to an injunction to restrain further cutting and removal, and to an account in respect to what has been already done, and the decree must be with costs.

I may add that if the case had turned upon the payment by *Labadie* of the taxes for 1854 and 5, I should, if it were desired by the plaintiff, have given a further inquiry upon that point, probably by an issue to try that particular fact, as the evidence of *Labadie* was not quite satisfactory in consequence of his defective memory, and the treasurer's receipts not being produced.

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WRIGHT V. THE INCORPORATED SYNOD OF THE
DIOCESE OF HURON.

*Church Society—Commutation Fund—Amendment of Canon—
Rule of procedure.*

Quere, whether a written license to a parson is necessary in the Diocese of Huron; but if necessary the defendants, having placed the name of the plaintiff on the list of clergymen entitled to a share in the Commutation Fund, could not afterwards object to the want of such license in a suit instituted by him to enforce payment of his share of such fund.

The right to pass by-laws necessarily imports a right to repeal the same, but this cannot be done to the prejudice of a party who has obtained rights under such by-laws, without his assent. Therefore the Church Society of the Diocese of Huron, having received certain moneys, invested the same, and then appointed a committee to consider the future application of the surplus of such fund, and on the report of the committee passed a by-law providing that every clergyman of not less than eight years' active service in the diocese, who was not under ecclesiastical censure, not on the Commutation Fund, and not in receipt of any salary, should be entitled to \$200 a year. Under such by-law the plaintiff was placed on the list of clergymen entitled to such allowance of \$200 from the surplus interest of such fund, and for some time received it, and the defendants, under an Act of the Legislature, succeeded the Church Society.

Held, that the plaintiff had a vested interest in such surplus interest of which he could not be deprived, so long as he came within the provisions of the by-law under which he had been placed on such list; and a subsequent by-law repealing all former by-laws, and declaring that all former grants made in pursuance of prior by-laws should cease, could not affect such vested rights of the plaintiff.

Semble, that the amendment set out at page 362, being to strike out a certain Canon and substitute another for it, though moved as an amendment to a proposed amendment of such Canon, was rather a substantive motion and should have been brought before the Synod through the standing committee.

This was a suit against *The Incorporated Synod of Huron*, instituted by the Reverend Joel Tomblason Wright, who sued as well on his own behalf as on behalf of all other the clergymen of the Diocese of Huron who were not on the Commutation Fund of that Diocese or on the Superannuation List thereof.

Statement.

the bill in which set forth (1) that the defendants were a corporation incorporated under the 38th Victoria, ch. 74, O. (2) That by that Act The Church Society of the Diocese of Huron, incorporated by 22 Victoria ch. 65, was united to and incorporated with The Synod of that Diocese, a corporation incorporated under the Act 19 & 20 Victoria ch. 141, under the name of "The Incorporated Synod of the Diocese of Huron." (3) That by the said Act, 38 Victoria ch. 74, all the property of every kind then held by or vested in the said Church Society was vested in the said Incorporated Synod, which name should stand in place of the said Church Society in all deeds, &c., relating to the property and affairs of that Society; and (4) The said Synod was declared subject to all the liabilities of the said Society, and to hold all property upon the same trusts. (5) The said Synod was thereby also declared to have all the powers, &c., conferred by the Act of 19 & 20 Vict., entitled "An Act to enable members of the United Church of England and Ireland to meet in Synod," as well as those conferred upon the Church Society by the several Acts of the Legislature; and that the Synod of Huron should have power to make such canons, rules, regulations, and by-laws, as might be considered necessary. (6) That by the Act 7 Victoria ch. 68, certain persons were incorporated as "The Church Society of the Diocese of Toronto" with, amongst others, power to purchase and take without license in Mortmain, for the purposes mentioned in the Act, all messuages, lands, &c., goods, moneys, &c., purchased, derived or bequeathed, in any manner to or in favour of the said Church Society; with power to hold meetings and pass by-laws, rules and regulations, (7) with power to make and ordain any constitution, by-laws, rules, and regulations, touching and concerning the well ordering and governing of the affairs and business thereof; and the same from time to time to abrogate or alter. (8) That by the

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1881. Act, 22 Victoria ch. 65, incorporating the Church Society of the Diocese of Huron, that Society was invested with the like corporate rights and powers as by any Act of the Legislature were conferred upon any Church Society incorporated in any Diocese of the Church of England in Canada. (9) That by that Act the said Society were empowered to receive and take from any of the Church Societies any of the property held by them, and to discharge the trusts thereof. (10) That the said Church Society of Huron, upon its separation from the Diocese of Toronto, became possessed of certain real and personal property and were invested with the distribution and management of certain trust funds, which, with other funds and endowments, had been agreed to be transferred to the said Church Society of Huron by that of Toronto under an agreement which was confirmed and legalized by the Act 24 Victoria ch. 125. (11) That by the Act 18 Victoria ch. 2, entitled, "An Act to make better provision for the appropriation of moneys arising from the lands heretofore known as the clergy reserves, by rendering them available for municipal purposes," it was provided that the annual stipends or allowances which had previously been paid should be the first charge on the municipalities' fund, and be paid out of the same in preference to all other charges or expenses. (12) That by the 4th section of that Act the Governor in Council was empowered with the consent of parties interested to commute such annual stipends, &c., at a certain named rate. (13) That the stipends of the clergy entitled were under that authority commuted by the Governor in Council, and by an arrangement between the clergy so entitled and the said Church Society of Toronto, it was agreed that the sums received as and for such commutation should be paid over to the said Church Society, who should hold the same upon and for the uses and on the trusts following, that is to say: (1) to pay the said clergy so commuting respectively their stipend or allowance

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during life, and (2) after the death of each of such clergy that the sum for which he had commuted should become the property of the said Church Society for the support and maintenance of the clergy of the said church within the Diocese, or such other Dioceses as the said Diocese should thereafter be divided into, and in such manner as should from time to time be declared by any by-law or by-laws of the said Church Society to be from time to time passed for that purpose. (14) That Her Majesty, by letters patent, dated 2nd October 1857, was pleased to divide the Diocese of Toronto into the Diocese of Toronto and the Diocese of Huron. (15) That the Church Societies of Toronto and Huron entered into an agreement to leave the division of the property and trust funds held by the said Church Society to the arbitrament and award of the then Bishops of Toronto and Huron, and in the event of their being unable to concur in an award, then to the award of the Honourable Sir *James Buchanan Macaulay* alone, and concerning the division or apportionment of the said property between the said Church Societies and the manner in which and the times when such division or apportionment should be carried out. (16) That on the 20th September, 1857, the said arbitrators made their award, ordering and adjudging, amongst other matters, that the said Church Society of Toronto should assign, &c., to the Church Society of Huron in debentures—set forth in a schedule—at their par value, the sum of £66,052 5s., and pay in cash the sum of £498 15s. on account of the share in such commutation fund coming to the said Church Society of Huron; and that upon the death of the then Bishop of Toronto the Church Society of Toronto should pay to the Church Society of Huron £2,686 13s. 4d.; on the death of the then Archdeacon of York £1,333, on the death of the Archdeacon of Kingston £756, and also on the death of the said three clergymen or on the 1st day of January, 1870, whichever should first happen, the

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further sum of £1,205 6s. 8d., all of which payments must be made by the said Church Society of Toronto in any securities held by them bearing six per cent. interest at their par value. (17) That the whole of the said sum of £72,532 was paid over to the Church Society of Huron and received by them, subject to the trusts created by the agreement entered into by the commuting clergymen and the Church Society of Toronto. (18) That under and by virtue of the powers conferred by the several Acts of Parliament and instruments above mentioned, the said Church Society of the Diocese of Huron did on the 2nd day of March, 1869, duly pass a by-law providing for the distribution of the surplus of the interest arising from the investment of the said commutation fund, after providing for the commuting clergy then entitled to receive their stipend from the said funds, in the words and figures following :—

Statement.

“ And be it further enacted by and under the authority of the Act of Incorporation of the Church Society of the Diocese of Huron (22 Victoria, chapter 65,) A.D. 1858, and by and with the sanction of the said Bishop of the said Diocese, that the surplus of the clergy commutation fund shall be apportioned as follows :—1. That in addition to the stipend derived from the Parish and Church Society funds every clergyman not under ecclesiastical censure of eight years' and upwards active service in the Diocese, who is not on the commutation fund, or who is not receiving a salary from any other source than the Church Society, or any other Society which contributes to church work in the Diocese, and with the exceptions hereinafter mentioned, shall receive \$200 per annum, beginning with the clergyman of longest standing so far as the surplus permits. 2. That if after paying the above there remains the surplus of \$200 or more, each of such clergymen of ten years standing, beginning with the one of senior standing, shall receive an additional \$200 per annum. 3. The provision made in section 1 of this by-law shall not extend to any clergyman enjoying an endowment of \$300 per year, nor that in section 1 extend to clergymen enjoying an endowment of \$500 a year, provided always that when a clergyman is once placed on the list for either of the above sums no further names shall be added until a surplus remains over and above what is required to meet the claims of those who have been placed on the list. Provided also, that whenever a clergyman is placed on the commutation list for \$200 per annum the grant, if any, which his mission receives from the Church

Society funds shall be withdrawn. 4. That every clergyman who shall be superannuated, whether from age, sickness, or mental infirmity, having been licensed to a parish or mission for eight years in the Diocese, shall be entitled to \$200 per annum, and such superannuated clergymen shall have the first claim according to their respective years of duty on the surplus fund. Further, that every superannuated clergyman who shall have been licensed to a parish or mission twelve years in this Diocese shall have a first claim for a second \$200 when the surplus permits. That any such clergyman claiming to be superannuated must forward, or his friends for him, to the Secretary of the Church Society a physician's certificate, said physician to be named by the Society, stating the causes which render him unfit for duty, such certificate to be annual if the Bishop or Church Society so require. 5. That in this report curates shall be regarded as possessing the same rights in respect thereof as though they were incumbents. 6. That all doubtful cases and cases not provided for in this report shall be brought before the standing committee, who shall recommend to the Society such action as they may deem each case requires."

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(19.) That the above by-laws or canons remained in force for some years, and were acted upon until the passing of another by-law or canon on the 25th day of August, A.D. 1874, entitled "Canon on the distribution of the Surplus Commutation Fund," which purported to amend the same, and which said last mentioned canon is in the words and figures following, that is to say :—

Statement.

1. That in addition to the stipend derived from the parish and Church Society funds every clergyman not under ecclesiastical censure of eight years and upwards active service in this Diocese, who is not on the Commutation Fund, or who is not receiving a salary from any other source than the Church Society, or any other Society which contributes to church work in the Diocese, and with the exceptions hereinafter mentioned, shall receive \$200 per annum, beginning with the clergyman of longest standing, so far as the surplus permits. 2. That if after paying the above there remains a surplus of \$200 or more, each of such clergymen of ten years' standing, beginning with the one of senior standing, shall receive an additional \$200 per annum. 3. The provisions made above shall not extend to any clergyman so long as and while he is enjoying a clerical income of over \$1,200 per annum, provided always, that when a clergyman is once placed on the list for either of the above sums, no further names shall be added until a surplus remains over and above what is required to meet the claims of those who have been placed on the list. Provided also, that whenever a clergyman is

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placed on the commutation list for a second \$200 per annum the grant, if any, which his mission receives from the Church Society funds shall be withdrawn. 4. That every clergyman who shall be superannuated, having been licensed to a parish or mission for eight years in this Diocese, shall be entitled to \$200 per annum, and such superannuated clergyman shall have the first claim according to their respective years of duty on the surplus fund. Further, that every superannuated clergymen who shall have been licensed to a parish or mission ten years in this Diocese, shall have a first claim for a second \$200 per annum when the surplus permits. 5. That there shall be kept a Diocesan Register of the non-commuted clergy. That up to June 6th, 1871, seniority in respect to those who have been ordained in the Diocese shall be reckoned according to the order of signature at deacon's orders in the Bishop's Register, and that after June 6, 1871, the Bishop shall immediately after any ordination furnish the order of seniority in which the newly-ordained are to be placed in the Diocesan Register. 6. With reference to those clergymen who, previous to June 6, 1871, have been received into the Diocese the time when they commenced duty with the Bishop's consent shall be taken as the time from which they shall date, and for the future the order in which clergymen received into the Diocese are licensed and registered by the Bishop shall be the order of seniority in which they shall be entered in the Diocesan Register. 7. That when any clergyman who has left this Diocese returns to take duty therein within five years from the time that he received his '*bene decessit*,' he shall be allowed all the time of his previous service in this Diocese; but any clergyman who remains away more than five years shall in case of his return be considered, in so far as to any claim on the surplus of the Commutation Fund, as beginning '*de novo*.' 8. That while any clergyman is engaged in any duty in addition to his clerical duties, for which he is in receipt of a salary, (except clergymen engaged in tuition which is strictly under clerical control with the Bishop's consent) such time shall not count as years of active service in the Diocese, but this rule shall not be held to have any effect previously to the passing of the Commutation Fund by-law. July 1st, 1869. 9. That all doubtful cases and cases not provided for in this report shall be brought before the standing committee, who shall recommend to the Society such action as they may deem each case requires."

The bill further alleged (20) that the plaintiff having been duly admitted to the order of Deacon on the 5th of August, 1861, and having been ordained priest on the 28th of October, 1862, had been on the 3rd day of June, 1873, engaged in active service as a clergyman for more than ten years in the Diocese, having been duly licensed by the Bishop thereof, and not being as he

had not been under ecclesiastical censure, and having been duly and properly qualified and entitled thereto, he was on that day duly and properly placed on the list of clergymen to receive the sum of \$200 per annum, from the said surplus interest arising from the Commutation Fund; and there then being, as in fact there was, an amount of such surplus unappropriated sufficient to enable the defendants to pay an annuity of \$200 to the plaintiff, and he thereby became entitled to receive the said sum of \$200 per annum under the provisions of such by-laws; and for over two years that sum was duly paid to him, but no sum on account thereof had been paid to him since 1st April, 1876, although frequently demanded from the defendants, and there had always been sufficient from the said surplus of such Commutation Fund to pay the plaintiff the said annuity of \$200, together with all other sums properly chargeable thereon under the provisions of the said by-law.

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The bill further stated (21) that on or about the 22nd of June, 1876, the defendant Synod purported and went through the form of passing a canon or by-law whereby they professed to rescind or repeal from the 1st day of April, 1876, all provisions and by-laws respecting the Commutation Fund and the surplus interest thereof; and further, the said Synod pretended to enact that all grants theretofore made under or in pursuance of the said by-laws or canons should from that day absolutely cease and determine. (22) That in or by the said pretended by-law or canon the defendants "purported and pretended to enact."

Statement.

"1. That all accrued interest over and above that required for the payment of the original commuted clergymen, and for the payment of expenses connected with the fund * * * shall be appropriated in the following manner and order. 2. Every clergyman of ten years active service in the Diocese who may be placed on the superannuation list, a superannuation allowance of \$400 per annum and an additional sum of \$10 for each and every year of active service above the ten years * * * 3. That after the above claims have been fully and first satisfied in the order as set forth in this canon, the balance, if

1881. any, shall form part of the Mission Fund. 4. That this canon shall take effect from and after April 1st, 1876, and all provisions, by-laws, and canons respecting the Commutation Fund, and the surplus interest thereof, shall be and are hereby rescinded from and after the said date, and all grants made in pursuance of any such by-laws or canons shall from said date absolutely cease and determine."

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The bill further alleged (23) that the said by-law or canon was not passed in accordance with, or in conformity to, the constitution and rules for the governance of the said Synod ; and that even if the defendants had power and authority to pass a by-law to rescind the canon under which the said annual sum was then being paid to the plaintiff, such by-law would be invalid and void on the ground that the same had been passed without proper notice having been given of the same ; the rules of the Synod providing that every proposition for an alteration in the constitution or rules of the Synod must be sent to the standing committee to be forwarded to the members of the Synod, which the plaintiff alleged had not been done. (24) That the said by-law had not a two-thirds' majority of either the clergy or laity as required by the rules, &c., then in force, and that on this ground also the same was invalid and void. (25) That the said by-law, even if in other respects legal, could not take from the plaintiff his vested right in and to the annuity of \$200, and that its operation would only be on so much of the surplus as was at the passing thereof unappropriated ; or which might from time to time, on the decease of the plaintiff and the other clergymen who had become entitled to an annuity under the by-law which it purported to repeal, be unappropriated, and no further. (26) That the said by-law in purporting, as it did in the third paragraph thereof, to appropriate a portion of such surplus to augment the mission fund of the said Diocese was illegal and void, and ought to be so declared, as the moneys belonging to the Commutation Fund and, the interest thereof were moneys held in trust by the defendants solely for the support and maintenance of

the clergy of the said Diocese ; and that in so allocating a portion of such moneys to the mission fund the defendants were guilty of a breach of trust, as such fund was used for purposes other than the support and maintenance of the clergy ; amongst others, the payment of interpreters and schoolmasters. (26a.) That on the 25th June, 1875, the defendants professed to pass a by-law or canon repealing or rescinding all provisions, &c., respecting the Commutation Fund and the surplus interest thereof, which was follows :—

“1. That all accrued interest over and above that required for the payment of the original claimants, and for the payment of expenses connected with the fund, or of any rate for which the fund may be assessed for expenses, shall be appropriated in the following manner and order. 2. That each of the original commuted clergymen who may be placed on the superannuated list of this Diocese shall receive such a grant from the accrued interest from the Commutation Fund as shall make his income not less than \$600 per annum. 3. Any clergyman who having been licensed for eight years in the Diocese and may be superannuated in accordance with the canon on superannuation, shall receive from the accrued interest of the Commutation Fund a grant of not less than \$400 per annum. 4. Every clergyman not under ecclesiastical censure of eight years' active service in this Diocese, according to seniority, shall be entitled to such a grant from the accrued interest of the Commutation Fund as shall make up his clerical income in the aggregate to \$800 per annum, and every such clergyman of ten years and upwards active service in like manner to an aggregate of \$1,000, including in each case the amount received from his parish or assessed by the Mission Board, and exclusive of fees and house rent, and such aggregate amounts shall stand as the absolute maximum to which said fund shall contribute. 5. That after the above claims have been fully and first satisfied in the order set forth in this canon, the balance, if any, shall form part of the mission fund. 6. That this canon shall take effect from April 1st, 1876, and all provisions, by-laws and canons respecting the surplus of the Commutation Fund, and amendments to such by-laws, shall be and are hereby rescinded from and after April 1st, 1876.”

(26b.) That such canon or by-law was not passed in accordance with the rules of the said Synod, and even if the Synod had power to enact a canon to rescind that under which such annual sum had been paid to the plaintiff, the said by-law of June, 1875, was invalid, as it was passed without proper notice of the intention

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1881. to introduce the same. (27) The plaintiff therefore submitted that the said sum of £72,532, with all interest to arise therefrom, had been set apart by the commuting clergy of the Diocese of Toronto for the purpose of furnishing support and maintenance for the clergy of the said Church within the said Diocese, or such other Dioceses as the said Diocese might be divided into, and that the funds were so transferred to the said Church Society of the Diocese of Huron, and by them transferred to the defendants, subject to the said trusts, and that they should be ordered to set such fund apart for that purpose only. (28) The plaintiff further submitted that the defendants should be restrained from further dealing with such fund, and that an account thereof should be taken shewing the disposition thereof, and of the interest arising therefrom, and (29) that plaintiff was entitled to be paid the arrears due him under the canon of the 3rd March, 1869, passed for the distribution of such fund.

Statement. The bill further stated (30) that since the filing of the original bill, and on the 22nd June, 1881, the defendants pretended to pass a by-law in the words following:—

“Canon declaring the true construction of the constitution, rules of order, and canons of the Synod, in the matter of amending canons, and also confirming and re-enacting the constitution, rules of order, and canons of the Synod.

“When any proposed canon or proposed amendment to a canon is regularly before the Synod for discussion in accordance with the constitution and rules of the Synod, any amendment thereto is in order without further notice, and this has been and is and shall hereafter be the true construction of the constitution and rules of the Synod in that behalf; and the constitution, rules of order, and the canons of the Synod as they appear in the printed records of the Synod, with the amendments thereto there mentioned, the canons being numbered from 1 to 31 inclusive, as enumerated in the annexed schedule, are hereby in every particular confirmed, ratified, and re-enacted.”

Schedule of Canons.

1. On the Election of a Bishop.
2. On Certificate of Election.

3. On the Election of a Coadjutor Bishop.
4. On the appointment of Dignitaries and other officers and their duties.
5. On Candidates for Orders.
6. On Candidates for Orders who have been ministers of other Denominations.
7. On the License to Clergymen.
8. On the admission of Strangers to Officiate.
9. On Lay Readers.
10. On the Patronage of Crown Rectories.
11. On Patronage.
12. On Synodical Rectories.
13. On notice to be given on leaving a Parish or Mission, and the amendment thereto passed, June, 1880. (See page 35, Journal).
14. On settling boundaries of Missions and Parishes and the subdivision and union of the same.
15. On Repairs and Dilapidations.
16. On restraining undue Expenditure in Church Building.
17. On Parochial Registers.
18. On Church Hymnals.
19. On the Formation and Organization of Vestries, declaring and defining the duties and powers of such vestries, and the amendment thereto, passed in June, 1880. (See page 57, Journal).
20. On Differences between Clergymen and their Congregations.
21. On Superannuation.
22. On the Discipline of the Clergy.
23. On Parishes required to make Collections regularly.
24. On Collecting for Local Objects beyond a Parish.
25. On the Submission to Arbitration and Confirmation of the Award between the Dioceses of Toronto and Huron.
26. On the Episcopal and Archdeacons' Fund.
27. On the Appropriation of the Commutation Fund.
28. On the Widows and Orphans' Fund, and the amendment thereto, passed in June, 1880. (See page 38, Journal).
29. On the Expenditure of the Mission Fund, and the amendments thereto, passed in June, 1880. (See page 43, Journal).
30. On the Election of the Delegates to the Provincial Synod and of any Committees of Synod which are elected by ballot, and the amendment thereto, passed in June, 1880. (See page 57 of the Journal).
31. On the Age of Clergy entering the Diocese.

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The plaintiff further submitted (31) that the said last mentioned canon was illegal and void, and that the said by-laws or canons of June 1875, and June, 1876, respectively, being illegal and *ultra vires* of the defendants for the reasons before stated, could not be

1881. confirmed and ratified by the defendants and the same were therefore illegal, inoperative and void.

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The prayer of the bill was (a) that the amount of the said Surplus Commutation Fund might be ascertained and declared and the trusts thereof established and decreed by the Court: (b) that the canon or by-law of the Church Society of Huron of 2nd March, 1869, might be declared to be in full force, and the said canons or by-laws improperly passed by the defendants lastly above mentioned might be declared illegal and void, and *ultra vires* of the defendants, and if necessary ordered to be rescinded by the defendants: (c) that the plaintiff might be declared to be entitled to the said sum of \$200 per annum and all arrears thereof so long as he remained in such standing as entitled him to take under the canon of 2nd March, 1869; or that he might be declared entitled to all arrears of his said stipend, and to be paid the same so long as he was entitled thereto under the provisions of the by-law or by-laws under which he became entitled to rank on said fund; and for an injunction, an account, and other relief.

Statement

The defendants answered the bill admitting the truth of the statements contained in the paragraphs thereof numbered from one to sixteen inclusive, and also the eighteenth and nineteenth paragraphs, and setting forth, amongst other matters, that of the sum awarded to the Diocese of Huron as set forth in the sixteenth paragraph of the bill the sum of £5,981 6s. 8d. was paid over to and received by the said Diocese on special trusts as set forth in the said award, to be and remain forever a fund from the proceeds of which should be paid certain sums to the Bishop of Huron and an Archdeacon of Huron for the time being, and therefore it was not competent to the plaintiff to call in question and investigate the whole of the said sum of £72,532; but if he did seek to investigate the whole of that sum then that the Bishop of the Diocese and the Archdeacons

thereof (three in number) should be made parties to the suit.

The answer further stated that by a by-law of the Church Society of Huron, passed 13th December, 1860 it was provided: "That the surplus of the interest of the Commutation Fund, after paying the salaries of those who are at the present time paid from this fund, should be given to the Mission Fund."

That such by-law or resolution remained in force till the passing of the by-law set out in the eighteenth paragraph of said bill, and during that interval the plaintiff had received his distributive share of the said surplus as a part of the said Mission Fund, and made no objection thereto in any manner, although the said Mission Fund was then not so restricted in its objects as was the Mission Fund to which the plaintiff objected by his bill.

From the printed "Journal of the Synod of the Church of England in the Diocese of Huron * * held in the city of London, on Tuesday, Wednesday, Thursday, and Friday, June 20, 21, 22, and 23, A.D. 1876," at page 41 it appears that in respect to the surplus Commutation Fund it was "moved by Rev. J. T. Wright, seconded by Ven. Archdeacon Marsh, that the following proposed amendments to Canon XIX 'on appropriation of the Commutation Fund' be received and considered clause by clause:

"1st. The following to be added to clause 1: (a) To make provision for clergymen who may be placed on the Superannuation Fund. (b) To assist clergymen who have laboured in the Diocese for twenty years and ten years respectively. 2nd. The following to be substituted for clauses 2 and 3: Every clergyman who may be placed on the superannuated list, of ten years' active service in the Diocese, shall receive a superannuation allowance of \$200 per annum, and an additional sum of \$10 for each and every year of service, from the commencement of his ministry in the Diocese; but in no case shall the said allowance exceed in the aggregate \$600. Provided, also, that the original annuitants on the fund shall date their term of active service from the commencement of their ministry in the original Diocese of Toronto, and that the amount of any annuity received by

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1881. them from the fund shall be included. 3rd. The following to be substituted for clause 4 : Clergymen of twenty years' active service in the Diocese shall receive annually a sum not exceeding \$400, provided their stipend (exclusive of fees and house rent) does not exceed \$800 per annum ; or such a proportion of the \$400 as would make \$1,200. Clergymen of ten years active service in the Diocese shall receive annually a sum not exceeding \$200 per annum, when their stipends (exclusive of fees and house rent) does not exceed \$800 per annum, or such a proportion of the \$200 as would make \$1,000. 4th. After clause 5 to insert the following clauses : Each parish shall be assessed by the Standing Committee of Synod for periods of three years, and such assessment shall be the basis for appropriating the amounts, or proportions thereof, to which the claimants may be entitled. That precedence, so far as the surplus will permit, shall be by seniority, as recorded in Diocesan Register, in the following order : (a) Superannuated clergymen ; (b) Clergymen of 20 years ; (c) Clergymen of 10 years. Provided always that no recipient shall have his allowance withdrawn until disqualified by any of or the several conditions of this Canon. Clergy already on the fund for the sum of \$200 per annum shall remain thereon under the conditions of the by-law at the time they received their allowance, but shall only be eligible for a further claim under the conditions of this Canon. Also, clergymen receiving a superannuation allowance or an annuity from the Commutation Fund prior to the passing of this by-law shall not be subject to any reduction."

Statement.

The motion then proposed to provide as to the absence of clergymen from the Diocese, and for the keeping of a Diocesan Register, and for the manner in which the seniority of the clergy should be reckoned, and that the Canon should take effect on the 1st of April, 1876; and also that all previous Canons, &c., respecting the Commutation Fund, should be rescinded, except in the cases of clergy already on the fund.

Thereupon an amendment thereto, and which is the amendment referred to in the judgment, was :

"Moved * * by Rev. Rural Dean Logan, seconded by Wm. Gray Esq.—

" XIII. *Resolved*, That clause 2 of the Canon of 1875 be struck out and the following substituted :

" Every clergyman of ten years' active service in the diocese who may be placed on the Superannuation List, and not being under ecclesiastical censure, shall receive a superannuation allowance of \$400 per annum and an additional sum of \$10 for each and every year of active service over and above the ten years from the commencement

of his ministry in the Diocese, but in no case shall the said allowance exceed in the aggregate \$600.

“That clauses 3 and 4 be struck out.

“That clause 5 becomes 3.

“That clause 6 becomes 4 and be amended to read as follows :

“That this Canon shall take effect from 1st April, 1876, and all provisions, by-laws and canons respecting the Commutation Fund and the surplus interest thereof shall be and are hereby rescinded from and after the said date ; and all grants made in pursuance of any such by-laws or canons shall from said date absolutely cease and determine.”

The Canon will read as follows :

“*On the Appropriation of the Commutation Fund.*”

“Be it therefore enacted by and under the authority of the Act to incorporate the Synod of the Diocese of Huron (38 Victoria ch. 78, 1874), that the interest of the Clergy Commutation Fund shall be appropriated as follows :”

Then follows the Canon as set forth in the 22nd paragraph of the bill.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at London, in the autumn of 1881.

The other facts, and the points relied on in the case appear in the judgment.

Mr. *Idington*, Q. C., Mr. *R. Smith*, Q. C., and Mr. *Harding* for the plaintiff.

Mr. *S. H. Blake*, Q. C., and Mr. *Betts*, for the defendants.

PROUDFOOT, J.—The *status* of the plaintiff was called in question upon the argument, though not in the pleadings, upon the ground that he had no written license from the bishop, pursuant to the 7th canon. I do not think this a valid objection. The plaintiff was admitted deacon in 1861, and ordained priest in 1862, and had the duly authorised charge of Wardsville till 1870, when he was transferred to St. Marys. He had no written license from the then Bishop *Cronyn*, but letters from the Bishop were produced, one to the churchwardens of St. Marys stating his appointment,

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Judgment.

1881. and another letter from the Bishop to the plaintiff was produced, written to him in the character of incumbent of St. Mary's. The Bishop of Toronto, in his examination, stated that, in his diocese at all events, a verbal license was sufficient,—and that it was a doubtful point whether a new license was required on the death of a Bishop. The plaintiff's name has appeared and now is on the list of clergymen of the diocese, he has been dealt with as such, and has been placed on the surplus interest fund as entitled to share in it. I think it is too late now to question his standing, and that if, in strictness, a license were required under the canon, it has been dispensed with by the action both of the Bishop and Synod.

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Judgment. On the question of fact, whether the amendment of Mr. *Logan* on 22nd June, 1876, was carried unanimously, as stated in the minutes, or by more than a two-thirds vote of both orders, I must hold that it was passed, if not unanimously, at all events with only a few dissentients. It is not surprising that there is a difference of opinion among the witnesses in narrating the occurrences of that evening, for there seems to have been very great confusion, and there might be reason to suppose that the rather tumultuous rising of the members of the Synod was for the purpose of singing the doxology, and not for the purpose of voting for the amendment. But the balance of testimony greatly preponderates in favour of both yeas and nays having been called for, and that though not absolutely unanimous, it might well be said, as Mr. *Reed* states, to be passed *nemine contradicente*.

Whether Mr. *Logan's* amendment was strictly an amendment, or was not rather a substantive motion, the inclination of my opinion is, that it was the latter. And that, assuming the Parliament to have the power to pass such a resolution as an amendment to a prior motion with which its principles are entirely at variance, I do not think such a rule can apply to a deliberative

body of the nature of the Synod, acting in regard to a trust confided to it, and not with the supreme power of Parliament, that might not only act in carrying out a trust, but extinguish it altogether. The constitution, section 16, seems to provide for discussion by the Synod of such matters as the bishop may desire to have brought before it, and all such other matters as may be forwarded to the standing committee through the secretary previous to the 1st of May. Mr. *Wright's* proposed amendment to the constitution was duly brought before the Synod in the manner required by this clause of the constitution. Mr. *Logan's* amendment does not purport to be an amendment to Mr. *Wright's*, but to the canon of 1875, and therefore should have been brought before the Synod through the standing committee, which it was not.

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But in the view I take of the case, it is not very material to consider this matter, as I have arrived at the conclusion that the Synod had no power to pass the resolution, assuming it to be properly before it. That the plaintiff had a vested right in the surplus interest, of which he could not be deprived so long as he came within the conditions of the by-law under which he was placed on the fund.

Judgment.

There was no question made by the defendants but that this was a trust fund, the only contention being that it was a fund entirely within the control of the defendants, who claim the power to declare not only who shall participate in the fund, but also from time to time to remove those who had already been placed upon it.

I now proceed to the consideration of the matters that have led me to the conclusion mentioned above.

The terms of the trust may be taken from the bond given to the commuting clergyman. "The said Church Society shall have and hold the said commutation money and all interest and proceeds thereon upon such trusts for the support and maintenance of the clergy of

1881. the said church, and in such manner, as shall from time to time be declared by any by-law or by-laws of the said Church Society to be from time to time passed for that purpose.”

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On the 9th September, 1859, the Church Society of Huron passed a by-law for the investment of the moneys received from the Church Society of Toronto, and after providing for the payment of the commuting clergymen directed, by clause v., that any balance of income remaining after all these claims are paid shall be left to the future disposition of the society. In March, 1860, the society resolved that the surplus of the commutation fund should be disposed of from time to time as the said bishop and the Church Society should see best. And in December, 1860, it was resolved that the surplus of the interest of the commutation fund, after paying the salaries of those who were then paid from the fund, should be given to the mission fund.

Judgment. In March, 1869, a committee appointed to consider the future application of the surplus of the commutation fund reported, and the report was adopted by the Church Society, and a by-law passed incorporating it, which enacted. “That in addition to the stipend derived from the parish and Church Society’s funds, every clergyman not under ecclesiastical censure, of eight years and upwards active service in the diocese, who is not on the commutation fund, or who is not receiving a salary from any other source than the church society, or any other society which contributes to church work in the diocese, and with the exceptions hereinafter mentioned shall receive \$200 per annum, beginning with the clergyman of longest standing, so far as the surplus permits.” Under this by-law the plaintiff was, on the 3rd of June, 1873, placed upon the list of clergymen to receive \$200 per annum from the surplus interest of the commutation fund, and received it for something over two years from that date.

In August, 1874, another by-law was passed amend-

ing that of 1869, but not in any matter to affect the plaintiff's position. 1881.

In December, 1874, the Act of the Ontario Legislature was passed incorporating the Synod of the Diocese of Huron, and uniting the Church Society with it. By the 6th section of the Act the synod was declared to hold all property vested in trust in the society upon the same trusts as such property was theretofore held by the society, and to administer the same according to the trusts.

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In June, 1875, a by-law was passed rescinding all previous by-laws on the subject of the commutation fund, and declaring other terms on which clergymen should be entitled to participate in the fund.

In June, 1876, another by-law was passed by the Synod, repealing all prior by-laws, and declaring the terms on which clergymen should be entitled to participate in the fund, and that all prior grants made in pursuance of prior laws should absolutely cease and determine from 1st April, 1876. Judgment.

This is the by-law that was attacked in the original bill, and on which there was a conflict of evidence as to its having, in fact, been passed.

The defendants do not deny that they hold the fund upon trust for the support and maintenance of the clergy of the diocese; and I am disposed to give a very wide scope to their power to determine the *manner* from time to time by by-law, and to decide who shall be placed upon the funds, and for what time, year by year, or while a certain condition exists or for life. The disposition in favour of the mission fund as in the resolution of December, 1860, may, I think, be supported if an equivalent be brought into that fund from other sources for such sums as may have been expended on other objects than the maintenance and support of the clergy, as seems to have been done in this case. And so, also, placing the fund at the disposition of the bishop and the society, as in the resolu-

1881. tion of March, 1860, would seem proper enough, always provided that the disposition was in accordance with the trust. Nor do I think that the Synod are bound to distribute the fund in equal shares among the recipients. And so far as the fund may be unappropriated, the terms and conditions on which the grant shall depend may be modified or varied. As at present advised the by-laws of 1875 and 1876 seem to me unobjectionable, except in regard to the repealing clauses, so far as they affect persons already placed on the fund.

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But after placing a clergyman upon the fund under the by-law of 1869, which specifies the conditions under which the benefit is conferred, viz., not under ecclesiastical censure, of a certain service in the diocese, not in the receipt of income from certain other sources, and which limits no time for the enjoyment of the allowance, I think it must be understood to confer a right to receive it so long as these conditions exist, that it was in fact an execution of the trust *pro tanto*.

Judgment.

The trust authorized them to place a person in the position of the plaintiff on the fund; in pursuance of that authority they have placed the plaintiff on the list. This is an exercise of the power conferred on them. The act is complete. Placing no limit on the time of enjoyment, it must be construed to be co-extensive with the existence of the conditions which entitled the plaintiff to be placed on the list. To enable the Synod to cancel this appointment would require stronger language than any I find here.

There does not seem to be anything, in the extensive powers I have assigned to the Synod, from which it can be logically concluded that it has the power to exclude, by a subsequent canon, those who shared in the surplus of the fund under a prior canon or by-law. The plaintiff had the right to assume, when placed on the fund, that he would remain there while the conditions on which the grant was made continue to exist.

There is no doubt that the power to make a by-law

generally includes the power to repeal. But it is a cardinal rule in regard to the repeal, that it cannot operate retrospectively to disturb private rights vested under it. *Dillon*, sec. 249.

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The canon or by-law of 1869, enacted that every clergyman coming within the conditions specified in it "shall receive \$200 per annum, beginning with the clergyman of longest standing, so far as the surplus permits." This was properly authenticated by the seal of the society. When the plaintiff in pursuance of this canon was placed on the list, it did not require an instrument under seal to state that he was a proper object of the canon. Placing his name on the list, as was done on the 3rd June, 1873, was sufficient to entitle him to the benefits of the canon under seal, and the payments subsequently made to him with the approbation of the authorities controlling the fund, are satisfactory evidence of his being on the list, and being properly on it.

I have been referred to a number of authorities to prove that allowances supposed to be similar to the plaintiff's may be revoked. But none of them seem to me to determine it. And in *Clarke v. The Imperial Gas Light and Coke Co. (a)*, where a pension was granted to the plaintiff in consideration of long services and on account of his being incapacitated by ill health from further services, by a bond under the seal of the defendants, he was held entitled to recover. Judgment.

The cases of a contrary character to which reference was made were the following: *Marchant v. Lee Conservancy Board (b)*, where trustees were authorized to make to any officer or servant of the company, whose services were no longer required by the company, an annuity or allowance, &c. The trustees passed a resolution granting the plaintiff an annuity. This was not under seal; and it was held that *for that reason* the

(a) 4 B. & Ad. 315. (b) L. R. 8 Ex. 290, and L. R. 9 Ex. 60.

1881. trustees might by a subsequent resolution reduce the amount.

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Gibson v. East India Co. (a), and *Innes v. East India Co. (b)*, were similar in principle, and decided on the same ground, that the defendants had incurred no legal liability. A marked distinction between these cases and the present is, that there the services had ceased, here they continue; there they were mere gratuities, here it is but an increased remuneration for continued service; and, upon the ground on which they were decided, they cease to be authority here, for the Act to bind the trustees, in this case, the canon, was under seal.

Judgment.

The instances of municipal officers in *Dillon* 1, 287, are different. The subject discussed there is the right to damages for dismissal from their offices; and it is reasonably said that they took the office with the knowledge of the power to remove, or cease to employ, and in the absence of agreement there could be no liability to compensate. In the present case, I think the plaintiff may properly contend that the trustees have no such right. Municipal officers have no ground for insisting on a right to be employed or for any "inheritance in service."

Regina v. Governors of Darlington School (c), has some resemblance in principle to the present, but is also distinguishable. The statute there authorized the governors to appoint masters and remove them at discretion. The governors passed a by-law that the removal should only be on complaint in writing. It was held that this was bad, as limiting the powers conferred by the statute. To make this case apply it would be necessary to shew that the execution of a trust was a limitation of the powers under the trust. But no one could contend for that—no one could argue that a gift of \$100 to an object of trust by the synod,

(a) 5 Bing. N. C. 262.

(b) 17 C. B. 351.

(c) 6 Q. B. 682.

might be recalled, as imposing a limitation on their powers. 1881.

But there the power was given to remove, which is just the element wanting here.

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I observe that in the diocese of Toronto, a clergyman placed on the list is to remain on it so long as he does duty in the diocese, or is not on the superannuated list, or under ecclesiastical censure.

Judgment.

Upon the whole, I think the plaintiff entitled to the relief he asks, with costs.

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REID V. REID.

Dower—Tenant for life—Interest—Principal.

The general rule as between a tenant for life and the remainderman in respect of a charge upon an estate, is, that the tenant for life must keep down the interest on such charge, and the duty of the remainderman is to pay the principal. This rule was applied where a widow claimed to have dower out of her husband's estate, which at the time of her marriage was subject to certain legacies and a mortgage, in preference to an annuity given her by his will; she being held bound to pay one-third of the interest on these claims until they became payable, after which the remainderman must pay all the interest as well as the principal thereof.

Examination of witnesses and hearing at the Spring sittings of the Court at Woodstock, 1881.

The facts are sufficiently stated in the judgment.

Mr. *Boyd*, Q. C., and Mr. *Totten* for the plaintiff.

Mr. *Ball*, Q. C., and Mr. *McDonald* for the defendants, other than the executors of *James Reid* against whom the bill was *pro confesso*.

Lundy v. Martin (a), *Greville v. Browne (b)*, *Bench v. Byles (c)*, *Bray v. Stevens (d)*, were referred to.

March 19th. SPRAGGE, C.—After examining the cases to which I was referred at the hearing, upon the question whether the legacies given by the will of *James Reid* are, under his will, chargeable upon his real estate devised, I continue of the opinion that they are so charged; but in the view that I take of the case that is not of very great consequence. Four legacies are bequeathed by the will: one of \$1000 to *James*, a son of the testator; one of \$200, together with two cows and a heifer, to his daughter *Isabella*; and \$200 to each of his other two daughters, *Betsey* and *Catharine*:

(a) 21 Gr. 452.

(b) 7 H. L. C. 689.

(c) 4 Mad. 187.

(d) L. R. 12 Ch. D. 162.

all the legacies being made payable as the legatees respectively become of age. The suit is by *Isabella*, the eldest of the family. The evidence establishes that the personalty was exhausted in the payment of debts, and no inquiry upon that head is asked at the hearing. The testator's real estate was devised to his widow, until his son *Alexander* should come of age, and then to *Alexander* in fee.

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After the testator's death his widow, *Ann Fraser Reid*, made a purchase of fourteen acres of land, with, as it appears in evidence, means of her own. She sold this land to *Alexander*, and the agreed consideration therefor, and for the release of her dower, was \$2,500. He paid her \$150 on account, and he made her a mortgage upon the fourteen acres and the land devised to secure the balance, \$2,350. *Alexander* after this married the defendant *Harriet Reid*, and died; and by his will devised all his real and personal estate to his brother, the defendant *James Reid*, subject to the payment of his debts, and of the mortgage on the land, and of an annuity of \$100 a year to his widow during widowhood, and in lieu of dower; and of a legacy of \$100 to *Isabella*, payable ten years after his death. The widow of *Alexander*, elects to take her dower in lieu of the provision for her under her husband's will.

Judgment.

Catharine, daughter of *James*, the testator, is still an infant. All the other legatees have come of age.

Alexander, before his marriage, held the land devised subject, upon the personalty being exhausted, to the legacies bequeathed by his father, and to the mortgage created by himself in favour of his mother; and it passed with his personalty to his devisee, *James*, subject to the same charges and to the annuity to his widow; and, upon her electing to take her dower, subject to her dower in place of the annuity. And the widow herself, electing to take her dower, was dowable of the land as it stood at the date of her marriage, *i. e.*, subject to the legacies and the mortgage,

1881. which were chargeable upon it in the hands of *Alexander* at the date of her marriage with him.

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Then how and in what proportion should the legacies and the mortgage be met by *James* and the widow respectively? *James* is tenant in fee; and the widow is tenant for life of one-third of the land, or of the rents and profits.

I take the general rule to be as between a tenant for life and a remainderman in respect of a charge upon an estate, that it is the duty of the tenant for life to pay the interest on the charge; and the duty of the remainderman to pay the principal.

To apply that rule to this case. The widow of *Alexander* would be chargeable with one-third of the interest on the mortgage until the principal became payable, and so on any balance of principal until it became payable. The title of *James* as devisee in fee, and the title of *Harriet*, widow of *Alexander*, as dowress, accrued at the same time, viz., the date of the death of *Alexander*;—4th of June, 1879. At that date one year's interest, *i.e.*, from 1st of January, 1878, was due on the mortgage, and one-third of that interest was as between her and *James*, the devisee, payable by her, amounting, as I compute, to \$44. What was afterwards payable by her is a matter of easy calculation. It would be less from time to time as the principal became payable; it being the duty of the devisee in fee to meet the principal.

Judgment.

Then as to the legacies. The plaintiff, the eldest child, came of age the 1st of July, 1871, and her legacy then became payable. The person to pay it, as there was no personalty, was *Alexander* himself. It was chargeable upon his estate. She was entitled to interest after coming of age, and the person or estate primarily chargeable with that interest was *Alexander* or his estate. After his death the person to pay the legacy was *James*, the devisee. *Harriet* the dowress is only properly a party because the land in which she

is a dowress, and which land stood and stands charged with the legacy may be sold to satisfy the legacy. It never lay upon her to pay the legacy or the arrears. The same observations apply to the legacy to *Betsey* and to the legacy to *Catharine*, except that her legacy is not yet payable. As to the legacy to *James*, he became of age and entitled to the legacy under his father's will on the 1st of June, 1879, and three days afterwards under *Alexander's* will he was devisee of the land upon which the legacy was charged, and the person to pay it, if it had been payable to any one but himself. As it was, the legacy was "at hand" three days after it was payable.

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The plaintiff has, in my view, quite misconceived the position and liabilities of the defendant *Harriet Reid*, and the defendant *James Reid*. If *Harriet* had by her answer, taken the proper ground as to her rights and liabilities, I should have given her her costs, but the grounds taken by her are untenable. The grounds taken by the plaintiff and the defendant *James Reid* are equally untenable. The defendant *Ann Fraser Reid* takes the ground that she is entitled to be paid her mortgage in preference to the dower of *Harriet*. I hold that her mortgage is a charge upon the land of *Alexander* in the hands of *James*, his devisee, and of the dowress; so that the ground taken by *Ann Fraser Reid* is in substance correct: and she is entitled to her costs; but it is *James* who must pay them, inasmuch as he is the real substantial defaulter upon the mortgage. The plaintiff and the other defendants will pay their own costs. The defendant *Harriet* is entitled to dower, and to have it assigned to her. It will stand charged to the extent that I have indicated.

Judgment.

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GILLAM V. GILLAM.

Dower—Election—Ignorantia juris, &c.

The testator made a provision in favour of his widow, much more advantageous to her than her interest as dowress, and which was expressly given in lieu of dower, and given during widowhood. The will was acted upon for two years, when the widow married a brother of her deceased husband, and thereupon filed a bill alleging that she had accepted the provisions and bequests made for, and given to her by the will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and she now sought to have dower assigned to her.

Held, that the rule "*Ignorantia juris neminem excusat*" applied, and the bill was dismissed, with costs.

Examination of witnesses and hearing at the Woodstock Sittings in the Spring of 1881.

The facts appear in the judgment.

Mr. *Boyd*, Q. C., for the plaintiff.

Mr. *Fletcher*, and Mr. *Moss*, for the defendants.

In addition to the cases mentioned in the judgment, *Wake v. Wake* (a), *Coleman v. Glanville* (b), *Westacott v. Cockerline* (c), *Walmsley v. Walmsley* (d), were referred to.

SPRAGGE, C.—The provision made by the will of the testator in favour of the widow was very much more favourable to her than her rights as dowress.

What is devised and bequeathed is in terms in lieu of dower; and is also *durante viduitate*.

He bequeaths to her all his household furniture, books, moneys, wearing apparel, a bay mare, a cow,

(a) 1 Ves. Jr. 335.

(b) 18 Gr. 42.

(c) 13 Gr. 79.

(d) 29 U. C. R. 214.

and a buggy, "for her sole and absolute use," and he devises all his real, and bequeaths all his personal estate (not bequeathed to his wife) to his executors in trust.

1881

Gillam
v.
Gillam.

The real estate consisted of a farm, the estimated value of which was \$9,000, and the executors were unwilling to sell it for a less sum. It was estimated at the hearing to be worth \$8,500, and the personalty other than that bequeathed was considerable, something over \$1,500. The testator died in November, 1878.

The will was acted upon. The widow received the specific articles bequeathed to her. She received the full amount of the rent of the farm, the executors having leased instead of selling it. A house in Merrickville was at her request purchased by them and occupied by her and her children, and she unquestionably took the benefits provided for her by the will.

In the spring of 1880 she became engaged to be married to *Joshua*, a brother of her deceased husband, and in December of the same year she married him; and thereby forfeited the provision made for her by her first husband's will.

Judgment

She now alleges that she took under her husband's will in ignorance of her right to dower if she elected to take it; and she swore that she was ignorant that she had such right until she consulted Mr. *Cook*, a solicitor, in the summer of 1880. The defendants invoke the maxim, *ignorantia juris non excusat*; and the plaintiff quotes Lord *Westbury's* explanation of the maxim in *Cooper v. Phibbs (a)*, where his lordship said: "It is said '*Ignorantia juris haud excusat*'; but in that maxim the word '*jus*' is used in the sense of denoting general law the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application."

(a) L. R. 2 H. L. at 170.

1881.

Gillam
v.
Gillam.

The latter part of Lord *Westbury's* observations shews how and why he held the maxim inapplicable to the case in judgment.

Lord *Chelmsford's* explanation of the maxim in *Earl Beauchamp v. Winn (a)*, is not quite so general. He says: "With regard to the objection that the mistake (if any) was one of law, and that the rule '*ignorantia juris neminem excusat*' applies, I would observe upon the peculiarity of this case that the ignorance imputable to the party was upon a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well known rule of law."

Judgment

Mr. *Fonblanque* in his book on Equity Jurisprudence, p. 119 *n*, thus states the rule, "As to ignorance of law it may be laid down as a general proposition that it shall not affect agreements, *nor excuse from the legal consequences of particular acts, even in Courts of Equity.*" This latter clause of the sentence applies precisely to this case. Mr. *Broome* quotes and adopts the above passage from Mr. *Fonblanque's* book, and refers to several cases in support of it (*b*), among others to the case of the *Directors of the Midland G. W. R. Co. v. Johnson (c)*. I would refer to the language in that case of Lord *Chelmsford*, at p. 810, and of Lord *Wensleydale* at p. 814; and to the rule as stated by Mr. *Spence*, vol. i, p. 663 that "the pretence of ignorance of law could not be used to enable a person to acquire what had not been his own, or to better his condition."

In the passage quoted by Mr. *Boyd* from Mr. *Scribner's* book on Dower, vol. ii, p. 484, it is put very strongly that "no acts will be binding on the widow unless done under a full knowledge of all the circumstances; and of her rights; and with the intention of

(a) L. R. 6 H. L. at 234.

(b) Legal Maxims, 5th Ed. p. 263.

(c) 6 H. L. C. 798.

electing. A mere acquiescence without a deliberate and intelligent choice, will not be an election," and there are other passages of the like import, supported chiefly by American cases. But this is materially qualified by the learned writer in a subsequent passage, p. 490,

There is one case in the American Courts, *Tooke v. Hardeman* (a), in which the learned Judge laid down broadly, p. 30, the rule contended for by the plaintiff here; but I find it laid down nowhere else, and the current of authority is against it.

The English case that is perhaps most in favour of the plaintiff is that of *Kidney v. Coussmaker* (b), where provision was made for the wife by will expressly in lieu of dower, and she elected to take under the will; and afterwards was allowed to retract and to have her dower. But this was allowed to her on the ground that she had elected under a mistaken impression that her husband's creditors would make no claim upon the estate devised to her. And so it was in reality, under a mistake of fact her election was made, and for that reason it was held not binding upon her.

There is no pretence in this case that there was any misapprehension by the widow upon any question of fact; and the provision in the widow's favour was so manifestly more for her benefit than her independent right of dower, that if she had known that she could have taken her dower in preference, if she had thought fit, it would have been shere folly in her to prefer to take her dower unless she contemplated a second marriage. She does not say now that she contemplated this, nor does she say that if she had known that she had a right to elect, she would have done otherwise than what she did, viz., take the provision given to her by the will.

I thought at the hearing upon the evidence before me, that it was true that the plaintiff did not know

1881.

Gillam
v.
Gillam.

Judgment.

(a) 7 Geo. 20.

(b) 12 Ves. at 143, 153.

1881.

Gillam
v.
Gillam.

that she had a right to elect: and that I could not say (whatever I might think to be probable), that she would not have elected to take her dower if she had known that she had a right to do so. If she then contemplated a second marriage (a matter as to which I could know nothing), she would probably have elected to take her dower, and I inclined to the opinion from the passage read to me from Mr. *Scribner's* book, and from the language of Lord *Westbury* in *Cooper v. Phibbs*, that the plaintiff's case was not within the maxim "*Ignorantia juris non excusat*"; but further consideration, and an examination of the authorities have led me to the conclusion that it would not only be dangerous to admit such a case as the plaintiff's to be outside of the rule, but that the authorities as well as reason are against it. I must, therefore, hold her bound by her accepting the provisions of the will, and acting in accordance with them.

Judgment.

The bill must be dismissed, and with costs.

1881.

KING V. HILTON.

Default of executor—Liability of co-executor.

H. & *C.* were appointed executors. *H.* took upon himself the actual management of the estate with the knowledge and consent of, but not under any express agreement with, *C.* *H.* applied a sum of money to his own use, but of this *C.* was not aware. The will contained the usual indemnity clause exonerating each from liability for the other.

Held, that *C.* was not liable for the sum appropriated by *H.*

An order for the administration of the real and personal estate of *W. Hilton*, was made in June, 1881, and on the 9th of December, 1881, the Master, to whom the proceeding was referred, made his Report. The case came on to be heard upon further directions; and as to the question of costs on the 25th January, 1882, when the only question argued was the liability of the defendant *Thomas Cummings*, as executor, for the misappropriation of funds of the estate by his co-executor, *John Hilton*.

Mr. *Winchester*, for the plaintiff and three legatees.

Mr. *Hall*, for the defendant *Hilton* and other legatees.

Mr. *W. N. Miller*, for the remaining legatees.

Mr. *Howell*, for the defendant *Cummings*, cited *Price v. Stokes*, 2 W. & T. 865.

Mr. *Winchester*, in reply, cited 2 *Williams* on Executors, 8th ed., 1834-5.

The facts appear in the judgment.

PROUDFOOT, J.—There were two executors, *John Hilton* and *Thomas Cummings*. Both proved the will. *John Hilton* is dead. The Master certifies that *John Hilton* took upon himself the actual management of the estate, but with the knowledge and consent of *Cummings*; and in so managing the estate

Judgment.

1881. *John Hilton* applied to his own use a portion of the money belonging to the estate, amounting to the sum of \$560.12, for which *Cummings* claims he is not liable, but with which the Master has charged him. The will contained, I am informed, the usual indemnity clause, exonerating each from liability for the other.

King v.
Hilton.

I do not think *Cummings* liable under these circumstances for this *devastavit* of *John Hilton*.

The law is very clearly stated in 2 *Williams* on Executors, 6th ed., 1680, *et seq.* An executor is not liable for such waste, provided he has not intentionally or otherwise contributed to it; the testator's misplaced confidence as to one shall not prejudice the other. He is not responsible for the assets come to the hands of his co-executor. If indeed he does any act, for instance, handing over the assets in his hands to his co-executor, who misapplies them, he will be generally responsible for them, just as if he had handed them over to a stranger. But if he is merely passive, by not obstructing his co-executor from getting the assets into his possession, he is not responsible. The cases he cites illustrate the rule very well. If by *agreement* among the executors, one is to manage one part of the estate and the other another part, each is answerable for the whole. Here, each receives a part by agreement with the other; and it is the same as if both had received: *Gill v. The Attorney-General* (a). And so where all joined in a sale of the testator's goods, and one was allowed to receive the money, the others were liable: *Burrows v. Walls* (b). And where several took out administration to an intestate, and united in appointing one to be the acting administrator, and directed the debtors to pay their debts to him, and he became insolvent, the others were made liable: *Lees v. Sanderson* (c). In all these cases there was an active intermeddling with the estate, and the defaulter had

Judgment.

(a) Hardr. 314. (b) 5 D. M. & G. 233. (c) 4 Sim. 28.

been enabled to receive the assets by their agreement for that purpose. 1882.

King
v.
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But that is very different from the case certified by the Master. *Hilton* taking the management with the knowledge and consent of *Cummings* does not, in my opinion, amount to any more than being merely passive within the meaning of the cases referred to by *Mr. Williams*. Had *Cummings* been aware of the misappropriation by *Hilton*, a very different case would have been presented. But each executor was entitled to receive the whole of the assets, and *John Hilton* was as much entitled to receive them as *Cummings*; the knowledge by *Cummings* that he was so receiving them could not make him liable, and if he knew it and did not interfere he was consenting. But there is not stated to have been any agreement between them for that purpose. And unless *Cummings* knew that *John Hilton* was misapplying the assets, he was not bound to interfere; the misplaced confidence of the testator shall not prejudice him. *John Hilton* was a brother of the testator, and it was not an unusual or unnatural conclusion to suppose he would administer the estate better than any one else. No imputation is cast on the good faith of *Cummings*. The reason why *Sir William Grant* exonerated *Lambert* from liability in the case of *Langford v. Gascoyne (a)*, should exonerate *Cummings* in this case. There on the day after the testator's funeral the three executors *Gascoyne*, *Spurrell*, and *Lambert* met at his house. His widow brought a bag of money into the room, and asked a person present to whom she should give it. This person not having a good opinion of *Gascoyne*, advised her to give it to *Spurrell*, which she did. *Spurrell* counted the money and gave it to *Gascoyne*. *Spurrell* was held liable but *Lambert* exonerated, as he had neither done nor said anything that in any degree

Judgment.

(a) 11 Ves. 333.

1881. contributed to the loss of the money, or to its getting into *Gascoyne's* hands. And Sir *William Grant* said that it was not incumbent on one executor, by force, to try to prevent the money getting into the hands of another. In that case *Lambert* knew the money got into *Gascoyne's* hands, and must have consented to it as much as *Cummings* did here, but in the absence of any knowledge of intended misappropriation he was not held liable.

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v.
Hilton.

Judgment.

I was referred to a passage in Mr. *Williams's* book, where he is said to have stated that the executor in such a case as the present would not be relieved from liability by the usual indemnity clause: 6th ed., p. 1687; 8th ed. 1834. But the author is there only speaking of executors who stand by and see a breach of trust committed. The indemnity clause, which has been enacted in R. S. O. ch. 107, sec. 2, is said to be of little practical utility, as it only enunciates what the law was before. (*Watters* on Statutes for Amendment of law, p. 344.) But there is no doubt a testator may define the duties of his trustees, and relieve them from the ordinary liabilities incident to their office: *Wilkins v. Hogg (a)*, per *Westbury*, C. However, in the present instance, I think the law sufficiently protects the executor without resorting to the indemnity clause.

Nor do I need to inquire as to the responsibility of an executor for joining in an act which might have been done by the co-executor alone; (2 *Williams* on Executors, 1691, 6th ed.) . No case of the kind is made here.

The decree will declare that *Cummings* is not responsible for the \$560.12.

1881.

RE ROSS.

Corroborative evidence—Statute of Limitations—Evidence Act, R. S. O. ch. 63—Executors, retainer by—Allowance of interest.

Where money is lent to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience.

Where each item in an account against the estate of a deceased person is an independent transaction and stands upon its own merits, and would constitute a separate and independent cause of action, some material corroboration of the testimony of the party interested in enforcing the demand must be adduced as to each item in order to satisfy the tenth section of the Evidence Act, R. S. O. ch. 63.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations. The circumstances under which interest on a claim ought to be allowed or refused in the Master's office, considered and acted on.

An administration matter.

The local Master at Barrie made his report allowing *John Ross*, the father of the testator, several items in his claim against his son's estate which were objected to by the creditors of the testator.

On the 1st December, 1881, an appeal from the report of the master by all other creditors of the testator as against the claim of *John Ross*, came on to be heard.

The judgment, in which the facts fully appear, was delivered on the 14th December, 1881.

Mr. *W. Macdonald*, for the appeal.

Mr. *G. W. Lount*, for *John Ross*.

BOYD, C.—After the son's death the father, who is his executor, sent in an account to the trade creditors shewing his claim against the son's estate to be \$2,907.

1881. Subsequently another statement was presented to a meeting of creditors, in which it was made \$4,507. The claimant explains by saying that he does not know anything about books, and that he did not know how much his son had credited him for, and that the statement was prepared by Mr. *Bowling*. *Bowling*, however, says he got the father's contra account \$4,154 from the father. At that time it was supposed the estate would pay all creditors. The father was residuary legatee. Subsequently, when it was found the assets would fall short, this claim was more than trebled, and it has been allowed by the master at \$12,503. The items added, with one exception, do not appear in the books of either father or son, and are, with but two exceptions, verified only by the testimony of the claimant. The two matters as to which the father is in some respect corroborated are, first, as to an item of \$3,000 (this being the only one which appears in the books), which is allowed by the master as a debt due by the son as of 17th February, 1873. We find an entry of about the same date in the son's cash book of \$3,000, as "deposited" with him by the father: and second, there is corroboration from the evidence of a brother, *William Ross*, and from an account rendered by the deceased to his father in 1872 (marked "F¹,") that the son was to pay interest, and probably at 9 per cent., to the father on another loan of \$4,000. This was the rate the father was himself paying to *Austin*, from whom he borrowed it, as he says, for the son. There was an unsigned agreement as to the \$4,000, which has disappeared since the son's death. There has been a tampering with the account F¹ so as to alter the year in the credit account, from 1871 to 1873, and the year 1872 has been interpolated between the months July and October, at the 9th line from the bottom of the last page. These are circumstances to be considered in giving effect to a claim resting largely on the evidence of the party interested.

Re Ross.

Judgment.

Nearly half the claim as allowed is made up of interest, as to which the father says he made no demand from the son, and as to which there is no evidence of any agreement to pay except the father's evidence, which is corroborated only as to the \$4,000. But although the master has disallowed the principal money, \$4,000, as being barred by the Statute of Limitations, he has allowed interest on it till the present time, which is certainly anomalous. The interest, being a mere accessory to the principal, if the latter is barred, so is the former: *Clark v. Alexander (a)*, *Montreal City Bank v. Perth (b)*. The last payment of interest is by the credit in account F¹, of the 1st October, 1871. This, as I have stated, has been improperly altered in the account to 1873; but the fact of the credit being given in 1871 is clearly shewn by the son's ledger. The son died on 7th September, 1878; probate was granted on the 8th of October of the same year, and the alleged loan was made on the 1st October, 1868. It is impossible to determine precisely when this loan was to be repaid. In one place the father says no time was specified; in another, the son was to pay when he was able. Either way, the Master may have rightly held that the statute began to run six years before the grant of probate. The loan in one aspect would be payable forthwith; in the other when the son was of ability. No specific evidence was given on the latter point, but it is a fair inference that he was for many years after 1868 well able to pay without drawing on the now antiquated view of Sergeant *Nares*, who argued that every man was able to pay his debts for *solvat per corpus qui non potest crumena*: *Davies v. Smith (c)*. - But it is well settled that ability may be shewn by a slight amount of evidence, such as is open to public observation, of the flourishing condition of a

1881.

Re Ross.

Judgment.

(a) 8 Scott's N. R. 147.

(b) 32 C. P. at 24, 28.

(c) 4 Esp. 36.

1881. man's business. It is not necessary to go so far as to shew a competency to pay without inconvenience, it is enough if there is property from which the debt may be paid; or, as put by Lord *Kenyon* in *Cole v. Saxby* (a), "if appearances indicate that he is of sufficient substance." This state of affairs regarding the son is assumed throughout the evidence before the master. So that in this regard the statute would have begun its course at all events when the last payment of interest was made in 1871: *Waters v. Thanet* (b), *Edmunds v. Downes* (c), *Scales v. Jacob* (d). But if the principal is barred so should also be the interest. There is no evidence of any such agreement as is set out in the schedule to the report to the effect that the father paid interest from year to year to *Austin*, and to some other mortgagee afterwards at the son's request; nor do I think that any such request should be implied in a case between father and son when the evidence is so extremely meagre and vague, and there has been so manifest an attempt to exaggerate any liability to the utmost. The appeal is allowed as to items 25—29.

Judgment.

As to the \$3,000, the evidence of the son's books implies that it is a debt which he owed to the father. But there is no sufficient evidence to justify the charging of any interest thereon. The father speaks of a sum of \$50, which he handed to his son as a deposit on the 7th of February, 1873, and for which he took a receipt as follows: "Received from John *Ross*, the sum of \$50, to be had when called for;" and it was on the 17th of the same month that the son's books shew that the \$3,000 was deposited with him by the father. The father says he did not call for a receipt for the \$3,000, as he supposed the son's books would shew it. One would suppose the deposits were made on the same terms. If so, no interest would be payable till the

(a) 3 Esp. 160.

(b) 2 Q. B. 757.

(c) 2 Cr. & M. 462.

(d) 3 Bing. 653.

money had been called for and payment refused: *Upton v. Lord Ferrers* (a), *Lowndes v. Collins* (b). Even in the case of money lent there is at common law no right to receive interest unless it is stipulated for or the payment of it is to be implied from the custom of merchants or special circumstances: *Higgins v. Sargent* (c), *Page v. Newman* (d), *Duncombe v. Brighton Club* (e). Here there are no special circumstances to induce the master to depart from the rule at law, and no attempt was made to take advantage of the provisions of the statute regarding interest. There is no demand of interest, there is no charging of interest in the books, no course of dealing which would imply any obligation by the son to pay interest; and I think it would be unsafe, in these circumstances, to allow the father by his sole testimony to receive interest at the rate of 9 per cent. amounting to \$2,357, and this, in competition with the trade creditors of the son.

1881.

Re Ross.

The statute (R. S. Ont. ch. 62, sec. 10) requires (what was before the statute the rule of the Court) that as against the estate of a deceased person no one should recover in respect of any matter occurring before the death of such person unless his evidence is corroborated by some other material evidence. It is urged that this account, consisting of 29 items, is corroborated in two or three points by independent evidence. But this cannot be sufficient where each item is or might be the matter of a separate and independent cause of action. Corroboration given of an agreement to repay a loan in one year, or of an agreement to pay interest on a certain sum of money cannot, by implication, substantiate an agreement to pay interest on a different sum of money, lent in a later or earlier year, or of an agreement to repay money advanced at another time. Each of such claims

Judgment.

(a) 5 Ves. 801.

(b) 17 Ves. 27.

(c) 2 B. & C. 348.

(d) 9 B. & C. 378.

(e) L. R. 10 Q. B. 371.

1881. stands on its own merits, and some material corroboration as to each should be adduced to satisfy the statute. It would be of dangerous consequence to hold that a person could recover claims for goods supplied and moneys lent in large amounts against the estate of a deceased person, no matter how extended the dealings and however isolated from each other, by verifying something material to the maintenance of his claim as to one or two out of the list. *A fortiori* is this the case where the transactions are between father and son, and presumptions of advancement or gift have to be overcome. I disallow the interest on this \$3,000, (item 4) but I overrule the appeal as to the principal sum, \$3,000, which is, I think, established by the son's books. There is no sufficient evidence, (*i. e.* none but the mere oath of the claimant), to warrant the allowance of items 1, 5, 7, 11, or the interest thereon.

Re Ross.

Judgment. In any event the master should not have computed interest on such an item as an account for dried meat alleged to have been supplied in April, 1873, and on which \$48 interest is allowed: No account was rendered, no agreement to pay interest, no demand of interest, and no vexatious delay in payment because no claim was ever made during the life of the son. If further evidence can be adduced on any of these items, the executor may have a reference back at his own expense. As to the item 9, there is a receipt for this \$50, which I have already set out, and it should be allowed; but as to the interest thereon, (item 10) it should be disallowed, because it was payable only on demand, and no demand was proved,

This disposes of every thing argued, except the appeal as to the allowance made to the executor. The master has perhaps made a liberal allowance, but I do not see that he has erred in principle. There is no ground for interfering with his conclusions, and I overrule this ground of appeal.

As to costs, the creditors have succeeded in part and

failed in part, and it will be better to award no costs as to their appeal. But I think the executor should pay the costs of his appeal as to the \$4,000, on which he has failed.

1881.

Re Ross.

As I held during the argument, this estate being insolvent, the Property and Trusts Act applies so as to displace any right of retainer in full on the part of the executor: *Willis v. Willis (a)*, and as against an executor claiming as creditor, any other creditor has the right to set up the Statute of Limitations: *Phillips v. Beal (b)*, *Shewen Vanderhost (c)*.

Judgment.

If desired, the matter may be remitted to the master to compute interest on the principal moneys affected by this appeal from the date of the decree, pursuant to G. O. 474.

(a) 20 Gr. 396.

(b) 32 Beav. 26.

(c) 1 R. & M. 347 ; 2 R. & M. 75.

1881.

SLATER V. MOSGROVE.

Statute of Limitations—Payment on account.

A promissory note made by the purchaser, and indorsed by his son, was given as security for the payment of land sold to the defendant, on which note a payment had been made by the indorser.

Held, that such payment was properly applicable to reduce the amount remaining due upon the purchase money, and was sufficient to prevent the running of the statute.

The bill in this cause was filed to establish a vendor's lien upon land, and in default of payment for a sale of the land.

On the 22nd May, 1881. *Nicholas Sparks* agreed to sell certain land to the defendant *Robert Mosgrove* for \$2,000, payable \$100 down and the balance at any time within twenty years, and interest from day of sale. The agreement was in writing, but was not signed by the parties. The cash payment of \$100 was made, and then possession was taken and the title accepted by *Robert Mosgrove*. Previous to May, 1865 a part payment of \$198.80, and interest was made, and a note was given by the defendant *Robert Mosgrove*, indorsed by his son the defendant *William Mosgrove*, payable 1st of May, 1865 for the balance of the purchase money. *Nicholas Sparks* died in February, 1862, and this note was given to his executors upon a statement rendered by them to *Robert Mosgrove*. On the 5th May, 1871, a payment of \$100 was made by *William Mosgrove* to the executors of *Sparks*. The entry in one of the books of the *Sparks* estate with regard to this payment was: "By cash, *Robert Mosgrove*, per *William Mosgrove* on account of interest \$100, 5th May, 1873." It was admitted at the trial that the note was given for the price of the land sold.

The issue between the plaintiff and the defendants was as to the payment of the \$100, on the 5th May, 1871. The cause came on for trial at the Ottawa

Sittings for the trial of actions in the Chancery Division on the 8th and 9th days of November, 1881.

1881.
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 Mosgrove.

Mr. *Gormully* and Mr. *Christie* appeared for the plaintiff.

Mr. *O'Gara*, Q.C., for the defendants.

BOYD, C.—At the close of the evidence I found that the payment of \$100 was made on the note held by the *Sparks* estate, and that the note was given as security for the price of the land, so that in my view it mattered little in law whether the payment was to be attributed to the note, or to be regarded as payment by *William Mosgrove* as agent for his father the vendee. In either case it seemed to me that it was a payment applicable to reduce the amount due upon the purchase money, and as a matter of fact credit was given for it in that way in the *Sparks* books, and in the subsequent account rendered to the father. This view is I find sustained by the language of *Fry, J.*, in *Harlock v. Ashberry (a)*, where he held that payment of rent, made by a tenant of the mortgagor, without his landlord's knowledge or direction, to the mortgagee was such a payment as stopped the running of the statute. He points out that Lord *Cranworth*, in *Chinnery v. Evans (b)*, thought it important to say that the statute said nothing as to the person by whom the payment was to be made, but that of course payment by a mere stranger would not keep the right of action alive. And then he puts a case, which is on all fours with the present: "Suppose, for instance, the mortgage carried with it as a collateral security a right to receive an annuity payable by a stranger, and that money was received by the mortgagee, it would be extremely difficult to say that the receipt by the

Dec. 14th

Judgment.

(a) 29 W. R. 887, 18 C. Div. 289. (b) 11 H. L. Ca. 115.

1881. mortgagee of the money from the stranger whose payments were pledged as security to the mortgagee, was not a 'payment,' within the meaning of the Act. It is clear he would have to bring such moneys into account as between himself and the mortgagor." See also, *Roddan v. Mosley (a)*. For the reasons given at more length at the hearing, and following the above authority, my judgment is in favour of the plaintiff. The amount due can be ascertained by the Registrar, and inserted in the decree as forming a lien upon the land, which, in default of payment, is to be sold to realize the amount and costs.

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Mosgrove.

Judgment.

1881.

RE BOARD OF EDUCATION OF NAPANEE AND THE
CORPORATION OF THE TOWN OF NAPANEE.

School trustees—School site—Mandamus—Practice.

A municipal corporation has no discretion in accepting or rejecting the requisition of school trustees for funds for a school site, except by a two-thirds vote. An adverse vote by a smaller majority is a virtual acceptance, and the requisition must therefore be complied with.

Under R. S. O. cap. 40, sec. 86, cap. 49, sec. 21, and cap. 52, ss. 4, et seq., the Court of Chancery could exercise the powers of a Court of law in any proceeding, and the powers of the Common Law Courts to grant mandamus upon motion not being by the latter act restricted, the Court of Chancery might also have granted a mandamus upon motion; and under the Judicature Act, nothing appearing to restrict the jurisdiction, the Chancery Division of the High Court of Justice has the same jurisdiction.

A summary application (there being no pending suit or action,) was made by the Board of Education of Napanee, on the 15th November, 1881, for a mandamus to the Municipal Council of Napanee to compel them to raise \$4,232 for school purposes, \$2,500 for the purpose of building a High School House or buying a house to be used as such and also as a Head Master's Residence, the rest for ordinary school purposes.

Statement.

It was objected by the Municipal Council:

(1) That the application could be made to the Chancery Division in cases only where a bill has been filed or an action begun.

(2) That the demand made by the board upon the council was bad upon the ground that it asked for a teacher's residence, which was asking too much, and on other grounds.

(3) That the Municipal Council had not refused the application, or passed upon it, but adjourned it for a short time.

It appeared by the affidavits filed that a by-law to raise \$2,500 for the school house, was submitted to the

1881. council and was held by the chairman to be lost, as seven voted for it and seven against it.

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It was contended by the applicants that this vote was practically a vote for the by-law, as it required a two-thirds vote to reject it, by 42 Vic. ch. 34, sec. 29, O.

Mr. *S. H. Blake*, Q.C., and Mr. *E. Meek*, appeared for the Board of Education.

Mr. *Bethune*, Q.C., and Mr. *Hoyles*, for the Municipal Council.

Nov. 16th. **PROUDFOOT, J.**—After the decisions that have been referred to of *School Trustees v. Toronto (a)*, *School Trustees v. Toronto (b)*, *Perth Case (c)*, and the statutes which they interpreted, R. S. O. ch. 204, sec. 104, sub-sec. 10; R. S. O. ch. 205, sec. 39, sub-secs. 4, 5, 6, 7, and secs. 29, 30, 31; R. S. O. ch. 174, sec. 461, sub-sec. 6, it is too late to argue that the municipal corporation had any discretion in accepting or rejecting the requisition of the trustees: their duty was to comply.

Judgment.

The later stat., 42, Vic. ch. 34, O., sec. 29, imposed a qualification on the absolute right of the trustees, by enabling the municipality by a two-thirds vote to reject the request, and then the trustees might require the matter to be submitted to the ratepayers.

In this instance, the municipality have not provided the money, and they have not rejected the requisition of the trustees. In effect the vote in the negative by less than two-thirds is in fact an affirmative vote, but the money is not forthcoming; the trustees have not been placed in a position to ask the opinion of the ratepayers, and thus their only other course is to ask for a mandamus.

The objection that the trustees ask for too much is not, I think, sustained in evidence. They make no

(a) 20 U. C. R. 302,

(b) 23 U. C. R. 203

(c) 39 U. C. R. 34, 44.

requisition for a residence for the high school master, which for the present I assume to be beyond their jurisdiction, though it is true that if they succeed in purchasing the house they have in view, they will obtain the contingent advantage at present of such a residence. But I cannot assume that Napanee will not need the whole of the new building for school accommodation, and from the number of children who ought to, but do not attend school, with the present school accommodation, I should imagine it would probably all be required.

It remains, then, to consider whether an application of this kind can be made to this division on motion, or whether a bill must be filed or another action begun to enable the plaintiffs to get the writ.

Under the A. J. A. it has been determined that proceedings in the nature of a mandamus might have been had from the Court of Chancery. It is true the only reported instances were where a bill had been filed. *Tully v. Farrell (a)*, *Marsh v. Huron College (b)*. But I see no reason for thinking that it might not have been obtained on motion. R. S. O. ch. 40, sec. 86, conferred jurisdiction on Chancery in all matters which would be cognizable at law, and ch. 49, sec. 21, gave it that jurisdiction in any suit or *other proceeding*. The Act respecting Writs of Mandamus, R. S. O. ch. 52, permitted a mandamus to be obtained in an ordinary action; sub-sec. 4, *et seq.*, but did not take away the jurisdiction the Courts of law had to grant writs on motion, and the Court of Chancery being clothed with all the jurisdiction of Courts of law must have had a similar power.

Since the Judicature Act, there is no longer a Court of Chancery, the Chancery Division, sec. 3, sub-sec. 3, is but one of the divisions of the High Court; and by sub-sec. 5, all the Judges have equal power, authority,

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Napanee, &c.

Judgment.

(a) 23 Gr. at 54.

(b) 27 Gr. 605.

1881. and jurisdiction. The Act sec. 17, sub-sec. 8, gives a right to issue a mandamus, which probably means in an action, but it does not assume to repeal the section in the R. S. O. ch. 52, which reserves the right to get it on motion. It seems to me, therefore, that this division may exercise the same power.

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From what has been said, it appears that I consider what has been done to amount to a demand and a refusal.

It is possible the defendants may be able to shew that a mandamus absolute ought not to issue, and they should have an opportunity of doing so if they can. The order will therefore be that a mandamus *nisi* issue, and I suppose the parties can agree upon the time for answering, &c.

I have not taken any notice of the objections to the eligibility of the site, as I think *that* is a matter with which the trustees have alone to do, and that neither I nor the Corporation of Napanee had any right to inquire as to the wisdom of their selection,—though I may say that from anything appearing in the affidavits read to me, there is no sufficient reason for questioning the propriety of their choice.

Judgment.

1881.

NELLIS V. SECOND MUTUAL BUILDING SOCIETY OF
OTTAWA.

Mutual Insurance Company—Default in payment on shares—Forfeiture of shares.

The plaintiff, on becoming a member of the defendant company, agreed to accept his shares subject to the rules of the company. Rule 6 was to the effect that in case of default of payment of dues for a year, the directors might forfeit any shares so in default. The plaintiff being in default for a year and upwards, the directors declared his shares forfeited, and this proceeding was afterwards confirmed at a meeting of the shareholders. The plaintiff thereupon instituted proceedings to have such forfeiture declared invalid, on the grounds, (1) that notice of the intention to forfeit had not been given to him, (2) that notice of the forfeiture had not been served on him, so that he had been unable to appeal to the shareholders; (3) that the resolution did not expel the plaintiff from membership; (4) that the plaintiff's name was not set forth in full in such resolution; it did not specify the shares to be forfeited, and other persons were included whose shares were jointly forfeited; (5) that no notice had been given of the holding of the annual meeting for the election of directors, so that the directorate was not legally constituted; (6) that one of the directors who voted for the forfeiture had become insolvent under the Act of 1875, although his shares continued to stand in his name in the books of the company; (7) that it was not shewn that proper and sufficient notice had been given of the meeting of the directors at which such forfeiture had been declared; (8) that the plaintiff had capital at his credit in the company out of which the arrears might have been paid; and that by a by-law of the company, "all fines and forfeitures should be charged to members liable, and, if not paid, deducted from capital at the credit of such member."

Held, that these objections could not prevail, and that as to the last, this was not such a forfeiture as was referred to in the rules.

The bill in this cause was filed to have it declared that the forfeiture of certain shares of the plaintiff in the defendant company was invalid, for reasons which fully appear in the judgment of the Chancellor.

The cause came on for trial at the Ottawa Sittings of the Chancery Division of the High Court of Justice upon the 9th of November, 1881. Statement

Mr. O'Gara, Q.C., and Mr. Gormully, for the plaintiff.

1881. Mr. Lees, Q.C., for the defendant.

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BOYD, C.—The effect of Rule 6 is, that upon default in payment of monthly dues for a year, the directors may elect to forfeit the shares so in default: *Moore v. Rawlins (a)*. The plaintiff bound himself to take his shares subject to this and the other rules of the company. The directors and society have in his case unequivocally indicated their intention to forfeit his shares by the directors' resolution to that effect of 22nd April, 1879, which was adopted and confirmed by the shareholders at the next general meeting thereafter held on the 14th May. But the plaintiff contends that this forfeiture should be declared invalid for a variety of reasons, which are very elaborately detailed in the pleadings. I proceed to consider the weight to be attached to these objections *seriatim*.

Judgment

First. It is urged that notice of intention to forfeit should have been given. This depends on the terms of the contract entered into by the shareholders with the company. In the present case no calls were required, but provision was made in the rules for the payment of the shares by monthly instalments of one dollar per share of capital, and five cents per share for management fees on the third Thursday of each month, and that whenever default should have been made for one year in payment of any of the monthly dues upon any share, that it should be lawful for the directors to declare such shares forfeited to the society. There is no stipulation that notice is to be given before such forfeiture is declared. Every member knew, or had the means of knowing, that if he failed to pay for a year the directors could forfeit his stock. This is not a case in which notice is a condition precedent to forfeiture, and I think the action of the directors was valid as against this objection: *Stewart v. Anglo California Co. (b)*, *Kelk's Case (c)*, *Stubbs v. Lister (d)*.

(a) 6 C. B. N. S. at 310.

(b) 18 Q. B. 736.

(c) L. R. 9 Eq. 107.

(d) 1 Y. & C. C. C. 81.

It is next urged that notice of the forfeiture having been declared should have been given to the plaintiff, that he might have appealed against the directors' action to the next general meeting, and that no minute of the forfeiture was made in the company's books. As a matter of law, the failure to give such notice, not being required in the constitution of the company, would not invalidate the forfeiture, and the entry in the books is not a matter mandatory, but only directory, so far as plaintiff is concerned: *Knights Case (a)*. As a matter of fact the plaintiff had notice of the forfeiture before the next meeting which was held for the confirmation of the directors' proceedings, but did not avail himself of it.

It was also argued that the resolution was invalid because it did not go far enough and provide for the expulsion of the plaintiff from membership. That is, I suppose, the necessary consequence of the forfeiture of his shares, but the omission so to state does not appear to be any reason to set aside what has been done: *Lyster's Case (b)*.

It was again urged that the resolution was bad because it did not set forth the plaintiff's name in full: because it did not state the number of shares intended to be forfeited, and because a number of other parties were included with the plaintiff, and the shares of all jointly were forfeited. The resolution was as follows:— Moved and seconded and carried: that “whereas the shares held by *S. & H. Bocbridge, Mary Conway, Jane Conway, H. McCormick, and T. F. Nellis*, being now twelve months and more in arrears, be it resolved: that under and by virtue of by-law No. 6 of this society, the shares of the aforesaid members be and are hereby declared forfeited to the society.” This resolution was reported to the general meeting of shareholders, held 15th May, 1879, and confirmed by them as follows:—

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(a) L. R. 2 Ch. 321.

(b) L. R. 4 Eq. at 236.

1881. "Your directors found at the end of the year that the following shareholders had allowed the shares held by them to become twelve months and more in arrears, therefore your directors, under and by virtue of by-law No. 6 of the society, have declared the shares severally held by them to be forfeited to the society, viz., *S. & H. Bocbridge*, ten shares; *Mary Conway*, five shares; *Jane Conway*, five shares; *H. McCormick*, two shares; *T. F. Nellis*, five shares."

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Judgment.

I do not consider any of these objections fatal. One is not called on to construe the resolution with the same precision as is applied to a conviction in a criminal matter, but all that the law requires is, that the intention to forfeit should be expressed with reasonable certainty and distinctness: *Knights' Case (a)*, *Cookney's Case (b)*. There is no pretence here, that there is any other shareholder of the same name as the plaintiff, or that the name "*Nellis*" alone would not have sufficiently identified him, or that there were any shares jointly held by the shareholders named. When "the shares" were forfeited it would mean "all the shares" held by the person, if none are expressly excepted. See *Joinder v. Union Ins. Co. (c)*. The confirmation of the resolution by the society also cures by its terms the last two objections: *Austin's Case (d)*.

Then the forfeiture is attacked on the ground that no notice was given of the holding of the annual meetings for the election of directors and confirmation of the forfeiture, and that there was for this reason no legally constituted directorate in 1878 or 1879. The by-laws sufficiently indicate when such meetings are to be held, and do not require any other notice to be given to the shareholders. By-law 2 fixes the days for making the monthly payments on the third Thursday of each month. By-law 11 speaks of the monthly loan meetings as

(a) L. R. 2 Ch. 321.
(c) Jur. 1867, p. 21.

(b) 3 Deg. & J. 170.
(d) 24 L. T. N. S. 932.

general meetings, and states that they are to be held on the evening of the third Thursday of each month. By-law 15 provides for the election of directors at the annual general meeting as therein after mentioned, and by-law 25 declares that the first general meeting is to be held in May each year. From these by-laws the conclusion is reached, that the annual meeting is to be held for the election of directors on the third Thursday of the month of May each year; and at such meeting the directors of 1878 were duly elected, and at such meeting the proceedings of the directors complained of were confirmed on the 15th May, 1879. These objections then should not prevail.

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The next ground of complaint is, that one of the directors, *McCormick*, who voted for the forfeiture of the plaintiff's shares was disqualified, because of his insolvency. The evidence was, that he became insolvent on 7th August, 1878, and that the creditors' assignee who was examined was appointed on 21st August, 1878. Nothing was proved about the termination of his insolvency.

Judgment.

Rule 15 provides that the holding of not less than five shares is requisite for qualification as a director; but this does not imply that the person is to be beneficially interested in such shares. *McCormick* was duly qualified when he was elected in May, 1878, and although his insolvency supervened, I find no evidence that his shares were accepted by the assignee in insolvency, but rather evidence the other way, to the effect that the assignee did not elect to become the holder of these shares, inasmuch as two of them were forfeited in April, 1879, as being then held by *McCormick*. It appears that five additional shares were assigned to him to hold in trust in February, 1879, [my notes are February, 1878, but I think this is an error as to the year], so that even when his two shares were forfeited, he still had the requisite number whereon to qualify. The rules of the society do not in terms provide that

1881. the insolvency of a director shall *per se* operate as a disqualification. There is thus no sufficient evidence to satisfy me that *McCormick* ceased to be the holder of five shares within the meaning of Rule 15, or that he was illegally a director during the period in question: *Pulbrook v. Richmond Co. (a)*, *South Staffordshire, Railway v. Burnside (b)*, *Phelps v. Lyle (c)*, per *Littledale, J.*

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The next objection is, that the meeting of directors at which the shares were forfeited was not a regular meeting, and that no proper notice of the special or extra meeting was given under by-law 21. It was proved that notices were given to the directors of the special meeting, but the secretary cannot recollect what was stated, as to the object of the meeting. I think it may be assumed on the authority of *Knigh's Case (d)*, that a proper notice was given: and at all events the confirmation of the proceedings by the society at the general meeting would cure any such objection even if it were open for the plaintiff to raise it. See also *Lyster's Case (e)*, *Austin's Case (f)*.

Judgment.

It is lastly set up that the plaintiff had capital at his credit in the company, within rule 33, sufficient to pay all arrears and fines, and that in such circumstances the company had no power to forfeit. Rule 33 is rather vaguely expressed: it is that all fines and forfeitures shall be charged to the members liable to the same, and if not paid deducted from any capital to the credit of such member, and shall be carried to the credit of the society. I do not think that the word "*forfeitures*" in this rule applies or is intended to apply to the arrears of monthly dues, the payment of which is provided for in Rule 6. The expression "*fin*e*s and forfeitures*" is first used in Rule 9, and is then so used as to convey the idea,

(a) 9 Ch. D. 610.

(c) 10 A. & E. 113.

(e) L. R. 4 Eq. 233.

(b) 5 Ex. 129.

(d) L. R. 2 Ch. 321.

(f) 24 L. T. N. S. 932.

that the person subject to such fines and forfeitures is still a member of the society, and entitled to withdraw his shares therefrom. I overrule this objection. 1881.

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The result is, that the plaintiff's case fails, though I should willingly have laid hold of any valid objection that I might set aside the forfeiture of which he complains. Though the company might in strictness proceed without notice, yet I think that the language of *Knight Bruce, V. C.*, in 1 Y. & C. C. C. 81, may well be applied here in that the exercise of this power without notice was harsh in the extreme. The value of the shares was at least \$270, and the defendants confiscated these for a claim of not one-third of that amount; had the plaintiff been notified he would have at once paid his arrears.

Judgment.

The bill is dismissed, without costs.

1881.

NATIONAL INSURANCE COMPANY V. EGLESON.

Partnership—Stock, Subscription for—Notice of calls.

The defendants, as partners, had been appointed agents of the plaintiffs, on condition that they should become holders of 200 shares of the capital stock of the Company. In pursuance of this arrangement they were entered in the stock register of the Company for that number of shares, under the partnership name; and 200 shares of the original stock were allotted to them and the usual certificate sent. They did not, however, formally subscribe for the stock. A draft upon the firm for the first call was accepted and paid, as arranged with one of the defendants. Subsequently *E.* wrote to the plaintiffs that he was about retiring from the firm, and desiring to be informed as to the position of the "stock subscribed for by them;" signing the letter as "senior partner," &c. *Held*, in an action for calls, that the defendants were liable, and could not be heard to say that they had not subscribed for the stock.

Held, also, that it was unnecessary to shew that any specific shares had been allotted to the defendants; or that the calls were made by properly constituted directors.

The notice of two calls, one payable on the 27th of July, the other on the 27th of August, was mailed at Montreal, on the 27th of June, addressed to the firm at Ottawa, which was received by one of the defendants. There was not any affirmative evidence that it was not communicated by him to his co-partner.

Held, that such notice was insufficient, as "not less than 30 days notice" was required; and therefore the mailing of a notice on the 27th of June, requiring a call to be paid on the 27th of July, was not in time:—otherwise the notice was sufficiently established.

An action for calls upon shares of the stock of the plaintiffs' company, tried at the Ottawa Sittings for the trial of actions in the Chancery Division on the 9th and 10th days of November, 1881.

The facts appear in the judgment.

Mr. *Gormully*, for the plaintiffs.

Mr. *Lees*, Q.C., for the defendant *Egleson*.

Mr. *O'Gara*, Q.C., and Mr. *McTavish*, for the defendant *Cluff*.

BOYD, C.—The defendants applied to be appointed district agents of the plaintiffs, and it was a condition of their appointment that they should become holders of 200 shares of stock. This is by no means an uncommon arrangement in such cases, and one to which *Cluff*, who conducted the negotiations with the officers of the company, assented. Upon this they were appointed agents by instrument, executed the 10th December, 1875, and the secretary entered in the stock register at that time the names of "*Egleson and Cluff*," as shareholders for 200 shares. The shares allotted to them, were original shares not previously taken up. To *Cluff* was given a stock book, and he was asked to subscribe formally for the stock therein. Whether this was done or not, is not in evidence, as it is said that the company have never been able to get this book back, and it is not produced. It was arranged with *Cluff* that the company should draw on *Egleson and Cluff* at three months for payment of the first call of ten per cent. This was carried out on the 24th December, 1875, by a draft for \$2,000, which was accepted by *Cluff* in the name of "*Egleson and Cluff*," and it was afterwards paid by him. As an acknowledgment of this draft, the company on the 28th December, 1875, sent a stock certificate, in the form of a receipt, which was as follows: "Received from Messrs. *Egleson & Cluff*, of Ottawa, the sum of \$2,000, being first instalment of ten per cent. upon two hundred shares of the capital stock of this company, in the name of *Egleson & Cluff*." On the 31st August, 1876, *Egleson* wrote a letter to the company, in which he says that as he is about retiring from the firm of *Egleson & Cluff*, he desires to be informed of the position of the "stock subscribed for by them." He signs this letter "*J. Egleson*, senior partner of *Egleson & Cluff*." An answer was promptly sent to him, of date 1st September, in which he is informed that the first instalment on 200 shares of stock has been paid. To this *Egleson*

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1881. sent no reply and made no objection. It appears the partnership of the defendants as agents of the company terminated about September, 1876, and although the secretary of the company knew something of this at the end of the year, yet no communication of the fact was sent by either of the partners to the company,


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Two calls were made by the company on the 25th June, 1877, one payable on the 27th July, and the other on the 27th August, 1877. On the 26th June, advertisements were published of the calls, and one notice addressed to *Egleson & Cluff*, was mailed at Montreal, on the 27th June, which was proved to have reached *Cluff's* hands on the 29th June. It is not shewn affirmatively that this was not communicated to *Egleson* by *Cluff*.

Judgment. At the close of the case, I was of opinion (which subsequent consideration has confirmed) that there was a taking of stock by *Cluff* for both defendants, and that *Egleson* had empowered him so to act, or that *Egleson* knowing what had been done expressly sanctioned it. I consider the letter of the 31st of August, as a piece of evidence, almost conclusive against *Egleson's* contention that he knew nothing of the stock having been taken, and that *Cluff* had no authority to act for him in the matter. I am satisfied on the evidence that both intended and were contented to take the stock as the only means by which they could secure the company's agency. This being so, it was argued that the defendants were not bound because there was no subscription in writing by them for the stock. It is true the Act (38 Vict. ch. 84 D.) speaks of the shares being "vested in the several persons who shall subscribe for the same." (Section 3 :) And in section 6, that the shares of the capital stock subscribed for shall be paid in by instalments, of which not less than 30 days notice shall be given. But though subscription in writing is one way in which stock may be taken, it is not the only way. Many cases are to be found in the books which con-

strue the term "subscribe" as equivalent to a holding or a taking of the stock. See per *Crompton, J.*, in *Wolverhampton v. Hawksford (a)*, and *Hawkins's Case (b)*, and many other cases are to be found in which a party is estopped from setting up that he is not a shareholder, as in *Harvey v. Kay (c)*, *Kiely v. Smith (d)*. Both these lines of decisions are applicable here. We find all the essentials requisite for the acquisition of the shares according to the English authorities. In *Bloxam's Case (e)*, it is said that if a person applies for shares and pays what is necessary and has the shares allotted to him, he becomes a shareholder, and that the application need not be in writing. Here this and more is done, because not only is the entry made in the company's books, but the fact of the allotment of 200 shares is communicated to the defendants; *Pellat's Case (f)*. Here then the contract was complete in all its essentials of application and allotment, of notice and certificate of that allotment; so that I think both defendants occupy the position of and are liable as shareholders. I refer also on this part of the case to the following authorities: *Gordon's Case (g)*, *Cookney's Case (h)*, *Re Valparaiso Co., (i)* *Re Richards, (k)*, *Evans's Case (l)*, *Fraser's Case (m)*, and *Ilfracombe Co. v. Nash, (n)*.

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Besides this main defence, other subsidiary grounds were urged which may be arranged thus: It is objected, (1) that no specific stock is allotted to the defendants, and that calls cannot be made unless the particular stock on which the calls are made is indicated; (2) that proper notice was not given of the calls, and in particular

(a) 11 C. B. N. S. at 464.

(c) 9 B. & C. 356.

(e) 33 Beav. 530.

(g) 3 Deg. & Sm. 249.

(i) 26 L. T. N. S. 650,

(l) L. R. 2 Chy. 427.

(n) 22 L. T. N. S. 209.

(b) 2 K. & J. 253.

(d) 27 Gr. 220.

(f) L. R. 2 Chy. 528.

(h) 3 Deg. & J. 170.

(k) 24 L. T. N. S. 752.

(m) 24 L. T. N. S. 746.

1881. that the notice sent to *Egleson & Cluff*, was not sufficient so far as *Egleson* was concerned, as it did not reach his hands; (3) that the calls are not shewn to have been made by properly constituted directors; and (4), that the notice of the call payable on 27th of July, was insufficient as to length of time.

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As to the first objection, the authorities shew that no weight is to be attached to it. When the company have sufficient unallotted original stock in hand to answer the number of shares required, it does not seem necessary to number and ear-mark the particular shares allotted. A share is defined to be an incorporeal right to a certain portion of the profits of the company. The substance of the transaction is that the defendants agree to take 200 of these shares of the company as a consideration for their being appointed the company's agents, and in pursuance of this 200 shares are set apart for them: *Ind's Case (a)*, *Thomson's Case (b)*, *Cookney's Case (c)*, *Lake Superior Co. v. Morrison (d)*.

Judgment.

As to the second objection, the charter and by-laws of the company do not provide for any special manner of giving notice of calls, and therefore the usual way in similar cases is sufficient. Communication by letter or through the post is not only unobjectionable but it is the usual manner. The only point of difficulty is whether one notice, addressed to "*Egleson & Cluff, Ottawa*," which *Cluff* alone is proved to have received is, in the circumstances, notice to *Egleson* of the call, having been made. The relationship of these defendants, as to their dealings with the company is spoken of in the evidence as one of partnership. It is not unreasonable then to apply rules applicable to the giving of notice in partnership cases after dissolution. The Court is averse to relieving persons from the payment

(a) L. R. 7 Ch. 485.

(c) 3 Deg. & J. 170.

(b) 4 DeG. J. & Sm. 749.

(d) 22 C. P. 217.

of calls on objections not meritorious in character; 1881.
Shackleford v. Dangerfield (a), Austin's Case, (b). It
 is well settled that notice to one partner is, in a part-
 nership transaction, treated as notice to the other, and
 this obtains after dissolution as to matters which are
 to be thereafter completed. So far as the company is
 concerned the two were liable to pay just as before,
 and the same notice that would suffice before should
 be enough after dissolution, in the absence of any
 request from either of the partners that a different
 mode of notification should be employed. The defendant
Egleson cannot complain of this mode of treatment, as
 he speaks of himself as senior partner, and as he is
 informed that the shares have been allotted to *Egleson*
& Cluff, and that communications between the defen-
 dants and the company are being carried on under that
 name: *Butchart v. Dresser (c), Murphy v. Yeomans (d),*
Ault v. Goodrich (e), Pritchard v. Draper, (f) Lewis
v. Reilly (g), per Lord *Denman*. Even if the partner-
 ship element be eliminated from the transaction, and Judgment.
 the defendants be regarded merely as joint proprietors
 of the shares, the better opinion appears to be that
 notice to one would be imputed to the other, or that
 notice to one would be sufficient to justify the infer-
 ence (in the absence of other evidence) that informa-
 tion of it reached the other: *Doe dem. Macartney v.*
Crick (h), Doe dem. Bradford v. Watkins (i).

As to the third objection; no defence is made on the
 ground of irregularity in the appointment of the direc-
 tors; and in the absence of this, it does not devolve
 upon the plaintiffs to prove that which the law pre-
 sumes to be regular.

(a) L. R. 31 C. P. 407.

(b) 24 L. T. N. S. 932.

(c) 10 Ha. 453, 4 DeG. M. & G. 542.

(d) 29 C. P. 421.

(e) 4 Russ. 430.

(f) Tam. 332.

(g) 1 Q. B. 349.

(h) 5 Esp. 196.

(i) 7 East 551.

1881. As to the last objection, it is entitled to prevail.

National
Ins Co.
v.
Egleson.

The statute provides that, "not less than 30 days notice" shall be given. Even if the time ran from the date of posting the letter, yet the 27th June for the 27th July, is too short a notice. The case cited *Re Jennings (a)*, is no authority for the sufficiency of the notice; whereas the later case not cited of *Reg. ex rel. Latouche v. Lander (b)*, is express upon the construction of the exact words we have to deal with, viz., that "not less than such a number of days," means so many clear days. See also *Beard v. Gray (c)*.

Judgment. The conclusion of the whole then is, that both defendants are liable to pay the amount of the third call, and they should pay the costs of the litigation.

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(a) 1 Ir. Ch. R. 654.

(b) Ir. R. 1 C. L. 225.

(c) 3 Ch. Cham. R. 104

1881.

MERCHANTS' BANK V. BELL.

Estate of married women, liability of—Promissory note—Notice of dishonour—Sufficiency of notice.

The rule of the Court is, that it will not restrain a married woman from dealing with her separate estate pending suit ; but if she die seized thereof, the Court will administer her estate for the satisfaction of her debts.

Held, therefore, that the estate of a married woman deceased in the hands of her infant heirs was liable to the payment of a note on which she was indorser as surety for her husband.

The indorser—a married woman—died intestate during the currency of the note, and notice of protest was sent to “*James Bell*, executor of the last will and testament of *M. A. Bell*, Perth,” and received by the husband, who resided with his children in the house which his deceased wife had occupied. No letters of administration had been granted.

Held, that the notice was sufficient, and the interest of the husband as tenant by the curtesy was directed to be exhausted, before resorting to the estate of the children in remainder. The costs of the infant defendants were to be added to the plaintiffs' claim, and paid out of the estate if not realized against the husband.

An action upon a promissory note for \$230, made by the defendant *James Bell* and indorsed by his wife *Marian A. Bell*

On the 29th January, 1879, *James Bell* delivered to the plaintiffs a promissory note for \$230 payable one month after date and indorsed by his wife as surety, to secure to the plaintiffs an indebtedness by the husband of \$230. During the currency of the note *Marian A. Bell* died intestate. The note was protested after maturity for non-payment, and notice of protest was given to *James Bell* as executor of *Marian A. Bell*. The parties were married in the year 1863. The wife at that time owned property, but there was no marriage settlement. After the wife's death, the husband became entitled to a life estate in his wife's lands and her infant children to the remainder.

Statement.

The action was heard before *Boyd*, C., at Brockville on the 16th November, 1881, and judgment was

1881. then given in favour of the plaintiffs against the estate of the husband and wife. Judgment upon the question as to the sufficiency of the notice of dishonour and as to the estate being followed in the hands of the infants was reserved. The facts so far as they concern the decision of these questions fully appear in the judgment of *Boyd, C.*, delivered on the 14th December, 1881.

Merchants'
Bank
v.
Bell.

Mr. *Radenhurst*, for the plaintiff.

Mr. *Hall*, for the defendant.

Judgment. BOYD, C.—I disposed of all the questions involved in this case at the hearing except two. These are, first: the wife being surety for her husband by the indorsement of his promissory note, and dying intestate before it matured, can her separate estate be followed into the hands of her heirs-at-law, the infant defendants? And next, whether sufficient notice of dishonour was given to render her estate liable? Upon the first point the law is well settled, that the wife having indorsed the note, and having at that time the separate estate in question, must be intended to have designed a charge on the estate, since in no other way could the instrument have any operation: *Murray v. Burlee* (a), *Shattock v. Shattock* (b), *Kerr v. Stripp* (c). Before the note fell due she died intestate, and the question arises whether the creditor is to be defeated of his remedy against her separate estate by reason of its transmission upon her death to her heirs, the infant defendants. It is true that her assignment to a *bonâ fide* purchaser for value will defeat the right of the creditor to resort to her separate estate, but where it is transmitted to volunteers as on an intestacy, does a like result follow?

(a) 3 M. & K. 224.

(b) L. R. 2 Eq. 182.

(c) 24 Gr. 198.

The law seems to be well settled that pending suit the Court will not restrain her from dealing with her separate estate, any more than the Court will interfere against a man who is being sued for a debt, but if she dies seized of the property then the Court will administer her estate for the satisfaction of her debts payable out of that fund, just as a man's assets will be administered for the payment of his debts. This conclusion clearly results from the following line of authorities: *Owens v. Dickerson* (a), *Gregory v. Lockyer* (b), *Johnson v. Gallagher* (c), *Shattock v. Shattock* (d) *Robinson v. Pickering* (e), *London Chartered Bank of Australia v. Lempriere* (f), where the contention being between creditors of a deceased wife and infant appointees under her will, James, L. J., puts the matter pithily thus: "Given the relation of debtor and creditors in equity, all the consequences of such relation should appear to follow just as if there were no coverture in the case." (p. 596) The last case of *Godfrey v. Harben* (g), follows in the same direction, and all the later authorities are in favour of holding that creditors have such a remedy as against estate over which she has an appointing power, and that the creditors do not rank according to priorities but *pari passu*. This being so the decree here should be for the benefit of all creditors if the defendants desire an administration of the wife's separate estate, but I understand they prefer to pay forthwith if their contention fails.

The wife died on 19th February, 1879. The note was made on the 29th January, 1879, payable in a month. On the 3rd March the note was duly protested and notice sent to "*Mr. James Bell, Executor of the last will and testament of Marian A. Bell, Perth.*"

1881.
 Merchants'
 Bank
 v.
 Bell.

Judgment.

(a) Cr. & Ph. 48.

(c) 3 Deg. F. & J. at 520.

(e) 27 W. R. 385.

(g) 13 Ch. D. 216.

(b) 6 Madd. 90.

(d) L. R. 2 Eq. 182.

(f) L. R. 4 P. C. 572.

1881. At that date the husband was living in the same house as where she had lived, which is part of the separate estate in question, and was using and dealing with the furniture therein which had belonged to her also during her life. Here also all her children who were infants lived with their father. She left no will, and it was not shewn that any letters of administration had been taken out. The objection to the notice urged before me was that it should have been addressed generally to "the personal representative of the wife," and should have been sent to the late residence. In *Brown v. Marsh (a)*, the opinion is expressed that when the indorser dies intestate notice should either be served where he has lived and left effects before the grant of administration, or be given to the administrator as soon as practicable after his appointment. In the United States' decisions, the holding is in such cases that if notice be sent to the last residence or last place of business of the deceased it is sufficient *prima facie* to fix the liability of his estate, as it may reasonably be assumed that it will reach those interested: *Bigelow* on Bills and Notes, 282, 2nd ed. The little authority there is to be found upon this subject is collected and discussed in *Cosgrave v. Boyle (b)*, and in the Court below. Under *McKenzie v. Northrup (c)*, I think it is immaterial as to whether the person is styled "administrator" or "executor," if he is the person to whom notice should be given, as such a misnomer could not mislead. The fact here is there was no personal representative appointed although the husband may be regarded as potentially such, inasmuch as he had the right to obtain administration exclusively of all the world. Morally and legally the duty devolved on him to protect the estate, and he is the natural guardian of the infant inheritors

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Bank
v.
Bell.

Judgment.

(a) 1 C. P. 438.
(c) 22 C. P. 338.

(b) 5 A. R. 458.

of that estate. Practically too the notice reached the last place of residence of the wife, where her effects were, as being addressed to and received by her husband when living in that place. Having regard to all these circumstances, and in the absence of any clearly defined procedure to be observed, I think no injustice is done by holding that the Bank has done all that reasonably devolved on them to do in order to fix with liability the separate estate of the deceased wife.

1881.
 Merchants'
 Bank
 v.
 Bell

The estate of the husband by the curtesy in the land should first be exhausted before coming upon the children's estate in remainder. Costs of the infants should be paid by the plaintiffs, and being added to their own costs should be paid out of the estate, if they cannot be recovered from the adult defendant.

Judgment.

1881.

RE INGLEHART AND GAGNIER.

Vendors and Purchasers' Act—Building Society.

A mortgage was made, pursuant to 9 Vict. ch. 90, to the president and treasurer of a building society, their successors and assigns, in trust for the society. The society having subsequently exercised the power of sale, the then president and treasurer, successors of the original mortgagees, conveyed to the purchaser by a deed under seal not being the society's seal. The purchaser sold to *G.*, who objected to the title.

Held, that the lands were conveyed in fee simple to the president and treasurer by the mortgage, and that these officers for the time being had the power to convey in fee, that the power was duly exercised by them, and *G.* was bound to accept the title.

On the 25th January, 1882, a petition was presented for the opinion of the Court upon a question of title to land under the Vendors and Purchasers' Act.

The facts concerning the title and cases cited appear in the judgment delivered on the 26th January, 1882.

Mr. *Dingwall*, for the vendor.

Mr. *Furlong*, for the purchaser.

Judgment.

PROUDFOOT, J.—A mortgage had been made in 1855, to the President and Treasurer of the Permanent Building Society, incorporated under the 9 Vict. ch. 90, their successors and assigns, in trust for the society. The society subsequently exercised the power of sale in the mortgage, and on the 6th of November, 1861, the president and treasurer, successors of the original mortgagees, conveyed to the purchaser by a deed under seal, but not purporting to be a corporate seal; and by other conveyances, the estate purported to be sold, if effectually sold, has become vested in *Inglehart*. He has contracted for the sale of it to *Gagnier*, who objects to the title that the original mortgage passed only a life estate to the president and treasurer, as they are not a corporation, and the mortgage did not convey to

them and their heirs, but to them and their successors. 1881.

I think the vendor's title perfectly good. The Statute 9 Vict. ch. 90, declares that a society formed under it is a body corporate and politic. It does not declare that the president and treasurer are a corporation. But section 10 makes it lawful for the society to hold real estate in mortgage; and, as it specifies no lesser estate, they would be entitled to take mortgages in fee; and section 12 enacts that all titles and other securities of the society shall be vested in the president and treasurer for the time being, for the use and benefit of the society. There is nothing in the Act to shew that conveyances or mortgages are to be made to the society, and then that by operation of that statute the estate is to be vested in these officers. The mortgage follows the language of the Act and conveys the estate to the grantees and their successors for the use of the society, in the terms of the statute. It was not necessary that the grantees should be a corporation. They were the officers, the hands, of the corporation, and were by the statute authorized to hold in this manner.

Re Inglehart
and Gagnier.

Judgment.

The English cases relied on by the purchaser are not authority on this subject, for the societies there were not corporations, as pointed out in *The Farmers and Mechanics' Building Society v. Langstaff* (a), and the powers were conferred on trustees, not on the president and treasurer; and where there was no corporation, there could be no successors or assigns, in the sense of the English phraseology. The reason and the effect of the difference between the constitution of the English societies and ours, is pointed out in that case, p. 191: and that it would be at variance with section 12, *supra*, to require a seal in disposing of real estate.

The form of mortgage has been that adopted by the

(a) 9 U. C. R. 190.

1881. societies formed under the statute, and has received
 Re Inglehart and Gagnier. judicial sanction in many cases, among others, in those
 cited. In *Doe Barwick v. Clement (a)*, the mortgage
 was in fee to the president and treasurer, and their
 successors, &c., and the action seems to have been
 brought in the names of one of the original grantees
 and of a successor in the office of treasurer. Not a
 word is said as to the estate being for life, but it is
 discussed throughout as if the estates were, what they
 purport to be, in fee. So in *The Essex v. Beeman (b)*,
 the mortgage was in this form; and Sir *J. Robinson*
 says, the company had the legal estate, and he points
 out that under the 9 Vict. ch. 90, (though the society
 had the legal estate), the society must have sued by
 their president and treasurer.

The cases under the Religious Societies' Acts are
 analogous, and confirm the validity of the vendor's
 title in this case.

Judgment. These observations suffice to shew that I think the
 deed under the power of sale was properly executed.

I therefore answer the first question, that the lands
 were conveyed in fee simple to the president and treas-
 urer by the mortgage; and the third, that these officers
 for the time being had the power to convey in fee by
 the deed of October, 1881, and that the power was
 duly exercised by them. It is not necessary to an-
 swer the second.

The purchaser will pay the costs.

(a) 7 U. C. R. 549.

(b) 19 U. C. R. 509.

1881.

JOSEPH V. HAFFNER.

Practice—Parties—Insolvent Act of 1875—Trader—Practising Barrister.

One *C.*, a practising barrister, dealt largely in land transactions, but it was not shewn that he depended thereon for his living. Becoming insolvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by *C.*, and brought suit thereon against *H.*, the assignee in insolvency of *C.*, and *D.* and others, the owners of parts of the mortgaged lands. It was objected by *D.* that *C.* should have been made a party.

Held, that *C.* was not a trader within the meaning of the Insolvent Act and that nothing passed to the assignee in the insolvency proceedings. *C.* was therefore declared to be a necessary party, and leave was given to add him as a defendant.

A motion for judgment in a mortgage suit.

It was objected on behalf of the defendant *Dickson*, assignee of the equity of redemption in part of the mortgaged lands, that one *Clark* was a necessary party to the suit. The defendant *Haffner* was the assignee in insolvency of *Clark* under the Insolvent Act of 1875.

The facts further appear in the judgment.

Mr. *Rae*, for the plaintiff.

Mr. *H. Cassels*, for the defendant *Dickson*.

Bill *pro confesso* against the other defendants.

BOYD, C.—The plaintiff is the assignee of a mortgage made by one *Clark*. The defendant *Haffner* is the assignee in insolvency of *Clark*, and *Dickson* is a purchaser of a lot sold by the owner of the equity of redemption, who sold others also after the mortgage.

It is agreed that the mortgagor is a barrister-at-law and a dealer in real estate, but not otherwise a trader.

Dickson objects that *Clark*, not being a trader, was not subject to the insolvency law, and therefore that

1881. the equity of redemption is not vested in the assignee, and that *Clark* must be a party to the suit.

Joseph
v.
Haffner

I have considered the cases collected by Mr. *Clarke* in his useful book on the Insolvency Law, p, 14 *et seq.*, and I think that such a dealing with land as in this case does not constitute a trader within the meaning of the statute. It is not said that the mortgagor obtained his living in this way, and indeed it was admitted that he practised as a barrister. And notwithstanding the enlarged meaning given to the word "trader," embracing many occupations and employments that would not formerly have been comprehended under it, yet the trading does not extend to land or any interest in land: *Re Cleland (a)*.

Judgment.

But it was said that *Dickson* could not take the objection, because the proceeding in the Insolvent Court was conclusive. Nothing was said of an assignment having been executed by the mortgagor to the assignee, and I assume there was none, and that the whole proceeding was *in invitum*. To enable the plaintiff to succeed he must shew that he has the proper parties before the Court, and one of the most essential of these is the owner of the equity of redemption; he must therefore shew that the estate that was in *Clark* has vested in his assignee to exonerate him from the necessity of having *Clark* before the Court,—and any of the parties to the suit are entitled to require that all necessary parties be brought before the Court. If the proceedings in Insolvency are conclusive, the plaintiff has done all that is requisite. But I think it quite plain that the proceedings are not conclusive as to *Dickson*, or as to the parties not before the Insolvent Court. In the case of *Groves v. McArdle (b)*, cited by Mr. *Rae, Wilson, J.*, says, that the decisions under the English Bankruptcy Laws have been uniform from the earliest times, that the proceedings taken

(a) L. R. 2 Ch. 466.

(b) 33 U. C. R. 252, 258.

under them are not conclusive, but are inquirable into, and he refers to numerous cases that establish the proposition. 1881.

Joseph
v.
Haffner.

I think the motion might be refused, but as *Dickson* does not object to the plaintiff having liberty to amend that leave is given to him.

Plaintiff to pay the costs of the day.

HENDRIE V. BEATTY.

Interim injunction—Plaintiff's undertaking—Varying minutes.

On a motion to vary minutes, nothing can be done at variance with the order as granted, but additions or variations may be made so as to carry out the intention of the Court in pronouncing it.

An interim injunction was granted, without going into the case, in terms of an undertaking given by the defendants upon a prior return of the motion, that nothing should be done in the meantime. On settling the minutes the Registrar refused to comply with the request of the defendants, by inserting an undertaking on the part of the plaintiffs that the property be retained in the same plight and condition as at the date of the order. A motion was made to vary the minutes by inserting such an undertaking.

Held, that though the undertaking might have been properly asked for on the motion as a condition of granting the injunction, it could not now be exacted, as the effect would be to reverse or alter the order which had been made by arrangement of the parties. As a misunderstanding seemed to have arisen, however, the injunction was stayed for ten days to allow a substantive motion to be made for an injunction restraining the plaintiffs from doing anything detrimental to the property pending the interim injunction.

A motion made by the defendants on the 27th of January, 1882, to vary the minutes of an order for an injunction granted on the 15th November, 1881, by inserting an undertaking by the plaintiffs that nothing should be done to the detriment of an agreement by the defendants with the Grand Trunk Railway

1881. Mr. *Blake*, Q. C., for the defendants.

Hendrie
v.
Beatty.

Mr. *McCarthy*, Q. C., and Mr. *E. Martin*, Q. C., for the plaintiffs.

The facts appear in the judgment.

PROUDFOOT, J.—On the 30th June, 1881, a motion was made to Ferguson, V. C., for an injunction to restrain the Toronto, Grey, and Bruce Railway Company from handing over, and the Grand Trunk Railway Company from receiving, the Toronto, Grey, and Bruce Railway, &c. Counsel for defendants asked an enlargement, undertaking that nothing should be done in the meantime.

Judgment. The motion subsequently came on before me, on the 15th of November, when, without going into the case, it was arranged that the injunction should issue in terms of the undertaking, the plaintiffs to have liberty to amend.

In drawing up the order the Registrar has declined to insert an undertaking on the part of the plaintiffs to do nothing till the hearing.

A notice of motion was given to vary the minutes by inserting an undertaking on the part of the plaintiffs that the railway of the plaintiffs, the Toronto, Grey, and Bruce Railway Company, shall be retained in the same plight and condition as at the date of the order, (15th November,) or for such other order as may be just. The motion actually made is to insert an undertaking that the plaintiffs are to do nothing to the detriment of the agreement with the Grand Trunk Railway.

The reason for granting interlocutory injunctions is to retain matters unprejudiced by the acts of the parties until the hearing of the cause. And had the matter been mentioned to me when the motion was made, it is very probable that the injunction would

only have been granted upon giving such an undertaking, but I cannot compel the plaintiffs to undertake. All that I could do would be to stay the injunction, unless the undertaking were given. But the parties arranged, and I acted on the arrangement, that an injunction should issue without specifying any such undertaking. What I am asked to do, then, is practically to reverse the order already made.

When the minutes of an order are spoken to, I understand that nothing can be done at variance with the order, but additions or variations may be made, so as to carry out the intention of the Court in pronouncing it. Here the intention of the Court is to be found in the undertaking of the defendants, and in the subsequent arrangement. It does not seem to me that this necessarily implies a mutual undertaking, so that I would be justified in refusing to allow the injunction to issue without it, however reasonable I may think the request.

The plaintiffs, since the filing of the bill, have obtained control of the road, but anything they might do, being done *pendente lite*, would be voidable, and perhaps the defendants would suffer no ultimate damage from any act of theirs. The ability to complicate matters in litigation by transfers of titles, or otherwise, is however a good ground for enjoining any acts having that tendency.

The reasonableness of the defendants' request leads me to hope that the plaintiffs will not, on further consideration, resist it. Should they decline to accede to it, I cannot refuse them the injunction; but as there seems to have been a misunderstanding or mistake in reference to it, I will stay the issue of it for ten days, to enable the defendants to make a substantive motion for an injunction restraining the plaintiffs from doing anything to the detriment of the agreement with the Grand Trunk Railway.

1881.

Hendrie
v.
Beatty.

Judgment.

1882.

TRUDE V. PHENIX INSURANCE COMPANY.

Practice—Trial by Judge—Rehearing—Divisional Court, jurisdiction of.

Rules 274 and 317, O. J. A., restrict the jurisdiction of the Divisional Court after judgment to cases in which the findings of fact have been undisputed, and in which it is only sought to modify or set aside the conclusion drawn by the Judges therefrom; but if the appeal is on the whole case, as to both facts and law, it must be to the Court of Appeal.

Although the decree was pronounced before the Judicature Act, and might have been reheard under the former practice, yet the cause not having been set down to be reheard before the coming into force of the Act, it could not under the provisions of the Act respecting pending business, be reheard.

This cause was heard and a decree made on the 19th May, 1881. It was set down by the defendant after the coming in force of the Judicature Act for rehearing of the whole case before the Divisional Court.

Jan. 11th. Mr. *Plumb*, for the plaintiff, moved before the Divisional Court to strike the cause from the list for rehearing.

Mr. *W. A. Foster*, for the defendant, *contra*.

Jan. 13th. BOYD, C.—In the trial of an action before a Judge he can in view of the provisions of the Judicature Act take one of two courses. He can either at or after the trial give judgment upon the law and the facts together, according to the well-known course of procedure in the Court of Chancery, or he can separate these matters so as to take upon himself the trial of certain specific questions of fact, make his finding upon them as a jury might do, and afterwards decide upon the questions of law involved in his giving final judgment upon the findings of fact. In the latter alternative the findings are separate and distinct from the judgment to

be pronounced upon them. In *Krehl v. Burrell* (a), *Thesiger*, L. J., says: "The findings of the Judge on matters of fact and his judgment on questions of law arising upon those findings must properly be treated as separate acts of the Judge." These considerations go far to elucidate the meaning of Rule 317. That rule gives jurisdiction, at the option of the parties dissatisfied, to the Divisional Court to set aside the judgment directed to be entered at or after the trial by a Judge sitting without a jury, upon the ground that upon the finding as entered the judgment so directed is wrong. This is to be after there has been a motion for judgment (see heading of Order xxxvi.) In the language of *Mr. Griffith*, the obtaining of judgment under this Order is to be the result of a motion in Court, to which the other proceedings have only led up, and for which they shall have established grounds: *Griffith's* Judicature Act, p. 295 (1875.) By Rule 274, the Judge may direct his findings of fact to be entered by the proper officer at the trial, and this I understand to be "the finding as entered," referred to in Rule 317. The ground of the motion is limited to this, that having regard to the findings as entered the judgment based thereon is wrong. In other words the correctness of the findings being undisputed and conclusive as to the facts, it is sought to modify or set aside the judicial conclusion drawn therefrom as manifested in the award of judgment.

I cannot construe this rule in any other than this limited way. I cannot therefore come to the conclusion in a case like the present, where the Judge has disposed of the facts and law at one time without separation and in one decree or judgment, that the Divisional Court has any jurisdiction to review his conclusions of fact or to go into the evidence at all. This function is reserved, as I read the Act and rules, for the Court of Appeal,

1882.

Trude
v.
Phoenix
Ins. Co.

Judgment.

1882. who can alone deal with the whole case, both as to conclusions of fact and law. In my opinion the cause should be struck out of the list, and owing to the difficulties and uncertainty attending the new practice, I should say without costs. Under the former practice this case being heard, and the decree made on 19th May, 1881, might have been reviewed as desired upon a rehearing, but as the cause was not set down to be reheard before the 22nd August, we have already decided in *O'Grady v. McCaffrey (a)*, that the benefit of this course has not been preserved to the plaintiff by the provisions of the Act respecting pending business.

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v.
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PROUDFOOT, J.—Rule 274 provides for entry by the registrar of findings of matters of fact in a book to be kept for the purpose, and also to be indorsed on the copy of the pleadings made for the use of the Judge, to be certified, &c., and to contain directions as to judgment.

Judgment. Rule 317 gives any party leave to apply to a Divisional Court or to the Court of Appeal, to set aside a judgment upon the ground that upon the findings as entered the judgment is wrong.

It is plain that the findings cannot be questioned on such a motion.

It is not a motion for a new trial because the facts have been wrongly found, which could only be heard by the Court of Appeal (*Maclennan* 271), but for judgment, because the law has been wrongly applied to them.

This case was heard before the Judicature Act came into force. The Act only applies (in sec. 317) to actions tried under it. There was no practice previously as to finding formally the facts and directing judgment to be entered on them, and this section of the Act cannot therefore apply to them, for it is only

(a) Not reported.

applicable to cases where the judgment is wrong upon the findings as entered. 1882.

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The functions of a Divisional Court are defined in Rule 471, and do not include such a proceeding as the present. The whole functions, it is true, are not there specified, as an application for an erroneous application of the law on findings as entered may be made to it, but that is only, in the language of the Act, on the findings *as entered*, and can therefore only apply to cases subsequent to the Act where findings have been entered. And we have no authority to strike these words out of the Act, and to give the Divisional Court a power not conferred by the Act.

According to our recent decisions, this is not a matter pending which might be disposed of by the Divisional Court, for the notice of rehearing or hearing was not given till after the Act came in force.

I therefore think that neither upon the facts nor the law can the case be questioned here now.

This does not leave the party without a remedy, Judgmen . for he may appeal, or might have appealed, under the Appeal Act, R. S. O. ch. 38, sec. 18.

I think the motion to strike the case out should be granted.

FERGUSON, J., concurred.

*Cause struck out, without costs.**

* Order 510 of Supreme Court (Ont.) passed 28th January, 1882, gives any party a right to apply to the Divisional Court to set aside a judgment.

1881.

DRYDEN v. WOODS.

Will, construction of.

A testator directed that, at the death of his wife, if she survived him, all his estate (with certain exceptions) should be sold, and the proceeds equally divided among his four daughters and three sons and their children, after paying \$200 to each of the three children of his deceased daughter *R.* He left surviving him his widow, who was still living, three sons and four daughters and twenty-seven grandchildren, besides the children of *R.* Two of the grandchildren were born after the date of the will but before the testator's death, and one was born after his death.

Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the Court declined to make any order upon the will.

A bill filed for the construction of the will of *Thomas Dryden*.

On the 16th November, 1881, the cause came on to be heard by way of motion for judgment.

On the 7th December, 1881, judgment was delivered.

The material facts and the clause of the will upon which the contest arose appear in the judgment.

Mr. *S. H. Blake*, Q.C., and *Dunbar*, for the plaintiff.

Mr. *Plumb*, for one of the infant defendants.

Mr. *Ewart*, for the other infant defendants.

Mr. *Hoyles*, for the adult defendants.

PROUDFOOT, J.—It was admitted by counsel that the bequests to the widow put her to her election between them and her dower.

The chief difficulty was suggested to arise on the meaning to be put upon the following clause: "I direct that at the death of *Betsy Dryden*, my said wife,

if she should survive me, the real estate of which I may die possessed, with the exception of what I have hereinbefore willed to my son *Thomas*, be sold and realized, and the proceeds, together with all moneys, and the proceeds of all securities of every kind soever, and arising from the sale of my other personal estate and household effects and furniture, not otherwise devised by this my will, be equally divided among my four daughters and three sons and their children, after paying \$200 to each of the three children of my deceased daughter *Rachel*, said sums to constitute the whole amount coming to my said three grandchildren from my estate, and to be paid as soon as convenient after my death, if the said children be then of full age, and if not then of full age, that the money be kept until such age is attained and then to be paid without interest." The other parts of the will are immaterial, affording no indication of the intention of the testator in regard to the foregoing bequest.

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The testator left three sons and four daughters surviving him, and twenty-seven grandchildren, besides the three children of his deceased daughter *Rachel*, to whom legacies of \$200 each were given by the will. Two of the grandchildren were born after the date of the will, but before the testator's death, and one has been born since the testator's death. The widow of the testator is still alive.

Judgment.

Doubts have arisen whether the grandchildren take concurrently with their parents, or whether the parents take for life with remainder to their children,—and also whether among the grandchildren are to be included those born after the date of the will, but before the death of the testator,—and those born or to be born after the testator's death, but before the death of the widow.

These questions are not ripe for decision. Other grandchildren may come into existence before the death of the widow, and they would not be bound by

1881. any construction I might place on the will. I shall therefore decline to make any order upon it.

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But as all the parties capable of expressing a wish are desirous of having my opinion, and the grandchildren have been represented by counsel, I will state the inclination of my opinion, if it will be of any service to them,

I understand the general rule to be, as stated or assumed by Lord *Cottenham* in *Crockett v. Crockett* (a), that in the case of a simple gift to the mother and her children concurrent interests will be created, in the absence of any indications of an intention that the children should not take jointly with the mother. It would be a waste of time to cite the cases in support of this rule—they will be found in 2 *Jarm.*, ch. 38. (3rd ed.) A number of cases were referred to as establishing a contrary doctrine; but they were all governed by their particular circumstances, from which an intention was inferred to give to the parent a life interest. In this case I find no indication of any such intention, and indeed the phrase, *equally divided*, affords a strong argument the other way. *Bradley v. Wilson* (b) and *Shaw v. Thomas* (c), I think, govern this case.

Judgment.

Where the gift is immediate to children and grandchildren, only those in existence at the testator's death take. Where it is future, as in this case, at the death of the tenant for life, not only those in existence at the death of the testator, but all who shall be in existence at the death of the tenant for life are entitled. The cases are collected in 2 *Jarm.* ch. 30 (3rd ed. 2, 143), and 1 *Jarm.* ch. 10 (3rd ed. p. 306).

(a) 2 Ph. 553.
(c) 19 Gr. 489.

(b) 13 Gr. 642.

1882.

DAVIDSON v. OLIVER.

*Will, construction of—Bequests of farm stock—Future division of—
Life estate.*

A testator, who died in February, 1869, by his will, amongst other things, gave legacies payable in eight and thirteen years, and devised lot eight to his son *R.*, and lot nine to his son *D.*, subject to charges, the devisees to get possession thereof when his youngest child attained twenty-one. At that time *D.* and *R.* were to get one half of the stock and implements which would then be on the said lots, the other half to be divided amongst other legatees. The youngest child had not yet attained twenty-one. The Master at Hamilton directed an account to be brought in of the stock and implements at the time of the reference on said lots, being the proceeds of the old stock left thereon by the testator, and also those subsequently procured from the produce of the said lots; and also an account of the stock or implements left by the testator which still remained on the land. The defendants appealed on the ground that if any further account was to be furnished, it should be only of stock and implements purchased with the proceeds of the sale, or obtained by the exchange of the stock or implements left by the testator; which appeal was dismissed, with costs.

An appeal by the adult defendants from the certificate of the Master at Hamilton, heard on the 3rd January, 1882.

Mr. *Lee*, for the appellants.

Mr. *W. Cassels*, for the respondent, (the plaintiff.)

Mr. *Plumb*, for the infants.

Judgment was delivered on the 8th of February, 1882.

The facts sufficiently appear in the judgment.

PROUDFOOT, J.—Appeal from direction of Master at Hamilton, directing a better account of the personal estate of the testator, (consisting of the stock and implements on lots 8 and 9 in Onondaga,) referred to in

1882. the testator's will directed by the 4th and 6th paragraphs of the decree to be brought in; the account to be an account of the stock and implements now on said lots, being the proceeds of the old stock left thereon by the testator; and also those subsequently procured from the produce of said lots; and also an account of the stock and implements remaining on hand which were there at the testator's death.

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The defendants appeal from this direction, because under the 4th and 6th paragraphs of the decree, the plaintiff is only entitled to an account of the stock and implements left by the testator at the time of his death, and which still remain on the lots mentioned; and that if plaintiff is entitled to any further account, it is only of stock or implements purchased with the proceeds of the sale, or obtained by the exchange of the stock or implements left by the testator at his death.

Judgment.

The testator died in February, 1869, and by his will among other things gave a legacy to his son *Alexander* of \$1,600, payable on or before the 1st January, 1877; and a like sum to his son *Duncan*, payable on or before the 1st January, 1882; and he devised the said lot 8 to his son *Robert*, and lot 9 to his son *Douglas*, subject to some charges, and to get possession when his youngest child attained twenty-one; and *Douglas* and *Robert* were then to get one-half of the stock and implements which shall be at that time on the said lots, and the other half to be equally divided between *Alexander* and *Duncan*. The youngest child has not yet attained twenty-one.

The decree, by the fourth clause, declared the plaintiff entitled to the land devised by the will to *Douglas* and to his one-fourth part of the stock and implements which may be on lots 8 and 9 when the youngest child attains twenty-one.

The sixth clause of the decree ordered the Master to make an inquiry as to the stock and implements in the

will mentioned, (5th paragraph) and the same are to be left with the devisees in the will named, they undertaking to use the same in a husband-like manner.

It was contended for the defendants that the plaintiff was not entitled to anything more than an account of the stock and implements that were on the lands at the testator's death, and any others procured by the sale or exchange of these; not to any new ones that might have been purchased from the produce of the farm, or to any natural increase of the live stock.

I apprehend this question is concluded by the decree, which directs an account of the stock and implements in the 5th paragraph of the will mentioned, and the same to be left with the devisees on giving an undertaking, &c. The 5th paragraph of the will speaks of the stock and implements which shall be on the lands when the youngest child comes of age; and therefore must include all those there at any time intermediate between the death of testator and the youngest child coming of age; and if the decree were wrong in this respect, it should have been appealed from.

But if not concluded by the decree, I think the Master was right.

The testator contemplated, no doubt, that his children would live on the lots 8 and 9, being his farm, as he devised these lots to them and his wife till the youngest attained twenty-one, when the devisees in remainder were to get the exclusive possession of the lands. When he speaks of the stock and implements, he specifies they are to be those on the lands when the youngest attained twenty-one. But that was a time that would not arrive for sixteen or seventeen years. He could not have contemplated that any of the existing stock would remain till that time or that the implements in use at his death would remain unimpaired during that period. He had in view the keeping up of the stock, and the working of the farm, and to effect this would require the renewal of the implements, and the continuance of the live

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stock, by natural increase or purchase. The notion of carrying on the business of farming implies a continual variance in the live stock, some may be sold, some killed, &c., &c. And the cases seem to shew that there may be a tenancy for life of such articles, and a bequest in remainder: 2 *Redf. Wills*, 393. Farm stock and implements of husbandry are not things *quæ ipso usu consumuntur*: *Groves v. Wright (a)*. The question was considered by the Master of the Rolls in *Phillips v. Beal, (b)*, where a wine merchant gave everything he died possessed of to his wife, for life, and it was held that she took absolutely the wine he had for his private use, but only a life interest in the stock in trade. In *Cockayne v. Harrison (c)*, a farmer gave to his wife his farming stock and all other his personal estate, &c., during widowhood, and if she married again, then to trustees for sale. Part of the stock consisted of cattle, stacks of hay, and other consumable articles. The widow married again, and a question arose as to her interest. The Master of the Rolls says: "I am disposed to think after looking at all the cases, and particularly at that of *Groves v. Wright*, that the rule cannot be considered as quite settled; but I think that the distinction which I took in *Phillips v. Beal* is sound, and that I ought to follow it. Here is a gift for life of farming stock, which is made in connection with a gift for life of the business, the stock being necessary to carry on the business; and I think that under these circumstances the legatee is bound to keep up the stock; and further, that if it is sold off and the business discontinued, she only takes a life interest in the proceeds. Where there is no trade, I am disposed to adopt the view taken in *Randall v. Russell (d)*, and to hold that the legatee takes an absolute interest." And see 2 *Williams on Executors*, 1402, 8th ed.,

(a) 2 K. & J. 347.

(c) L. R. 13 Eq. 432.

(b) 32 Beav. 25.

(d) 3 Mer. 190.

and notes to *Ashburner v. Macguire*, in 2 W. & T., L. C. at 315, 4th ed.; 2 *Redf.* 274, sec. 28, and *n.* 47. 1882.

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At the time of the testator's death there were 20 cattle, 48 sheep, and 8 horses. None of the cattle now remain, having been disposed of from time to time, and the proceeds used in maintaining the family; none of the sheep are now remaining, having been long since sold and the proceeds applied for the same purpose; of the horses one only remains; one was exchanged for a cow, one died, one was sold, and the other four were taken by *Thomas* and *William* when they left home.

If the will be construed as the defendants wish, then the bequest of the stock and implements that shall be on the place when the youngest child attains twenty-one, will be wholly inoperative.

The undertaking required to be given by the 6th clause of the decree is the usual one in such cases: 2 *Williams* on Executors, 1402; 2 *Redf.* 272.

I was told, however, that when the case was before the Court of Appeal, that Court had held that only the legatees occupying the farm would be entitled to the profits; and I find it so expressed, in a proof sheet of the judgment.* My present opinion does not conflict with that construction. Keeping up the stock is an *expense* of working the farm, and the persons sharing in the stock, do not share in the profits.

Judgment.

I therefore dismiss the appeal, with costs.

* See 6 A. R. 559.

1882.

McLAREN V. CALDWELL.

Practice—Injunction—Appeal—Stay of proceedings.

The 27th section of the Court of Appeal Act, R. S. O., ch. 38, does not apply to proceedings by injunction, whether the writ has been issued before or after decree in the cause.

This was an injunction suit to restrain the use of an improved stream, and a decree had been pronounced in favour of the plaintiff restraining the use thereof by the defendants, from which the defendants appealed. While the case was under consideration of the Court of Appeal the plaintiff issued his injunction and served it. The defendants thereupon moved to stay proceedings, on the ground that execution was stayed, under section 27 of the Court of Appeal Act, upon security being perfected.

Mr. *Bethune*, Q. C., and Mr. *Moss*, in support of the application.

Mr. *McCarthy*, Q. C., and Mr. *Creelman*, contra.

FERGUSON, V. C., refused the application, on the ground that this section of the Act does not apply to injunctions, whether issued before or after decree.

1882.

THE CORPORATION OF THE VILLAGE OF GRAVENHURST V. THE CORPORATION OF THE TOWNSHIP OF MUSKOKA.

Pleading—Demurrer.

The bill alleged that the municipal councils of the respective corporations had adopted and sanctioned certain terms and conditions for dividing and settling the several liabilities and assets of the corporations upon their separating, and that both parties accepted such settlements as a final settlement between them, and acted thereupon :

Held, on demurrer, that it was not necessary to allege that such acceptance was by by-law ; although

Seemle, that at the hearing it might be necessary to establish that such was the fact.

The bill of complaint was filed by the municipality of the village of Gravenhurst, against the municipality of the township of Muskoka, and set out :—

That the township of Muskoka, in the district of Muskoka, prior to the 21st January, 1878, was composed of what now comprises the township of Muskoka and the village of Gravenhurst, and was possessed of certain assets and subject to certain liabilities which, upon a separation, would have to be adjusted ; that upon the said 21st day of January the separation took place ; that the plaintiffs and defendants having separated, it became necessary to adjust their several rights to the joint property and assets, and in order that the expense of an arbitration might be avoided, it was by resolutions of both councils of the two municipalities respectively resolved that their Reeves should arrange and agree upon the terms of division and settlement of the said property and assets, and that the two municipalities should be bound by whatever division and settlement the said Reeves should agree upon ; that within three months of the date of the separation the said Reeves, in pursuance of the resolutions of the councils, agreed upon a division and settlement of the

1882. said property and assets as follows:—1st. The defendants were to receive the whole of the income arising from any source for the year 1877. 2nd. The plaintiffs were to have, free from any claim of the defendants, the town hall with all its fittings and furniture. 3rd. The defendants were to pay to the plaintiffs \$109.50: that these terms of division and settlement were submitted to the councils of the plaintiffs and defendants, and were by them duly adopted and sanctioned; that owing to neglect and delay, the terms of settlement were not formally signed till the 23rd September, 1878, on which date a written document containing the said terms was signed by the said Reeves; that the plaintiffs and defendants both accepted the said settlement as a final settlement between them, and acted on it, the defendants collecting all the income for the year 1877, amounting to more than \$1,800, the plaintiffs occupying the town hall with the fittings and furniture, and the defendants promising to pay the plaintiffs the sum of \$109.50, agreed upon; that the plaintiffs have paid more than \$500 in discharge of an incumbrance existing at the date of the separation; that the plaintiffs at the request of the defendants several times extended the time for payment of the \$109.50 and interest, until the defendants on or about the 24th March, 1881, repudiated the said settlement and declined to pay the sum of \$109.50 and interest; that the plaintiffs upon the 29th March, 1881, took proceedings in the Second Division Court of the district of Muskoka, to recover from the defendants the said sum of \$109.50 and interest; that on the 31st March, 1881, the defendants served the plaintiffs with a certified copy of a by-law of the township of Muskoka, directing their Reeve to appoint some fit and proper person to the office of arbitrator on behalf of the defendants in the matter of a division of the assets and liabilities of the plaintiffs and defendants at the separation, in January, 1878, which by-law purported to have been

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passed on the said 24th day of March, 1881, and with a notice of arbitration in the same behalf under R. S. O. ch. 174, sec. 368. 1882.

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The plaintiffs submitted by the bill that the settlement was binding upon the defendants, even if it should be found that it was not agreed upon within three months from the separation, and that the matters mentioned in the by-law and notice of arbitration were disposed of; that the defendants were bound by the agreement entered into by their Reeves, and that the defendants were not entitled to take proceedings to compel the plaintiffs to arbitrate; and prayed that the defendants should be restrained from proceeding with the arbitration; that the defendants should be directed to pay the plaintiffs the sum of \$109.50 and interest, and the costs of the Division Court and of this suit.

The defendants demurred to the bill of complaint.

The demurrer came on for argument on the 14th day of September, 1881.

Mr. *Beaty*, Q. C., for the defendants.

Mr. *W. Mulock*, for the plaintiffs.

Judgment was delivered on the 20th September, 1881.

BOYD, C.—The demurrer was argued on the ground that no relief could be given, because it did not appear that any binding agreement for a division of assets was entered into between the corporations upon their separation. The bill states that the parties agreed that their respective Reeves should arrange the terms of a division, and that this was done; and the fifth paragraph says: "The terms of division and settlement were remitted to the council of both plaintiffs and defendants, and the same was duly adopted and sanctioned by the said councils respectively;" and the 7th section alleges "that the plaintiffs and defendants both accepted the

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1881. said settlement as a final settlement between them, and acted thereupon," &c. It is objected that these allegations do not shew how the parties adopted and sanctioned and accepted the said settlement, and that it should appear to be by by-law. As a question of evidence, this contention is probably well founded; as a question of pleading, the present manner of pleading and the line of more recent authorities is clearly against the objection. The demurrer admits the fact of there being a final settlement which both parties accepted. When it comes to the hearing the plaintiffs may have by evidence to establish that such is the fact, if that is the point of contest, as I understand it is. The distinction obtains in all the Courts. The cases cited of *Colon v. Provincial Insurance Company* (a), and again at p. 287, and other cases such as *Clarke v. Carroll* (b), *Perdue v. Hays* (c), and *Kilroy v. Simpkins* (d), shew this at law, and in equity it may be sufficient to refer to *Workman v. The Royal Insurance Company* (e), *Jones v. Imperial Bank* (f), *Wild v. Wild* (g).

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The demurrer is overruled, with leave to answer on the usual terms of paying costs and undertaking to go down, if required, at the next sittings for trial.

(a) 20 C. P. 21.

(c) 31 U. C. R. 515.

(e) 16 Gr. 185.

(g) 20 Gr. 251.

(b) 17 C. P. 538.

(d) 26 C. P. 281.

(f) 23 Gr. 276.

1882.

RE MURRAY—PURDOM v. MURRAY.

Administration—Gift inter vivos—Corroborative evidence—Costs.

In administration proceedings the widow of the testator claimed to have received as a gift from her husband a promissory note of one *P.*, made payable to the testator, and not indorsed by him. The widow, it was shewn, had had possession of this, as well as of other notes belonging to the estate, during her husband's lifetime. The only evidence corroborating that of the widow was that of *P.*, who stated that this note was spoken of by the testator as belonging to his wife, that he said he had given it to her, and he hoped he (*P.*) would pay it to her when he was able. Evidence in opposition to this was also given.

Held, on appeal from the Master at London that a good gift *inter vivos* had not been established, and that such note formed part of the general assets of the estate, and the widow was ordered to pay the costs of the appeal.

This was an administration matter, instituted to administer the estate of one *George Murray*, late of the township of Lobo, miller, deceased, by *Thomas Hunter Purdom* and *Alexander Russell*, executors of the deceased, against *Ann Murray*, widow of the testator, and others interested in his estate.

In taking the accounts in the office of the Master at London the widow claimed, as a gift from her husband to herself, a note of one *Parke*, amounting, with interest, to about \$1,500.

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The widow had been examined before the Master and swore :

" I am widow of the late *George Murray*. He died on the 20th September, 1879. The day before he died he spoke about the money in the bank. He asked me how many cheques I had, and I said, 'just one.' He said, 'very well, that will do for you,' and I said to him, 'you know I am going to keep the notes,' and he said, 'very well, you have the best right to them, and you keep the notes.' He referred to farmers' notes that he had out at interest. These notes had been produced before in that week, when I gave them to *William Oliver* to add them up, at *Mr. Murray's* request. There was a mortgage for \$330 with the

1882. notes, and I gave it to Mr. *Purdom*, the executor. There was another note of Mr. *Parke's* that my husband gave me three or four years before his death. That was my property, and had been for years. I attended on my husband, and nursed him up to the time of his death. * * * I was present when the instructions were given to Mr. *Purdom* to draw the will, and also when my husband was discussing the terms of his will with the *Olivers*. These notes were given to me on the day before Mr. *Murray's* death, on Friday morning, and he died on Saturday. I had always had possession of these notes. It was in the fore part of the week that the notes were taken out for *William Oliver*, and by Mr. *Murray's* direction he gave them back to me. I did not give Mr. *Parke's* note; it was not spoken of. I put the notes in the drawer, where I always kept them. Mr. *Parke's* note was kept in the same drawer in an envelope, separate from all others. I put them away in the same place, and they were never brought out again until after Mr. *Murray's* death, when I gave them to Mr. *Parke*. No person but Mr. *Murray* and myself was present when the notes were given to me on Friday morning."

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The maker of the note was also examined in the Master's office, and stated :

"I had given a promissory note to the late *George Murray*; the last one must have been \$1,200 or \$1,300. It was not paid; a payment was made on it, but the greater part remains unpaid; \$100 only has been paid on it. The present note is a renewal made, I think, three or four years ago; I believe it is in Mrs. *Murray's* possession. When I made the last note it was given to Mr. *Murray*; I do not know whether Mrs. *Murray* was present or not; it was in her possession at the time of his death, and was in her possession shortly after it was given, to my knowledge; it was drawn, I think, at one day. No proceedings have been taken to collect this note. Mrs. *Murray* has asked me for

payment on account both before Mr. *Murray's* death and since, and I did make a payment to her. I have no doubt that the note is now in her possession, but have no actual knowledge. It is not in my possession. I have paid nothing to Mrs. *Murray* since the death of Mr. *Murray*, but she has asked me for something on account. She did not press me, and it was not convenient to pay her; it was shortly before his death that I paid \$100 on account to Mr. *Murray* in the year he died, but cannot tell the date; the amount is indorsed on the note. The payment was made in my room at my office. I took no receipt, only indorsed it on the note. I do not doubt that I made the indorsement. * * I received no consideration whatever myself for the note I gave Mr. *Murray*; my first note was given in this way: He sold 100 acres of land to *S. Pomeroy*, and took a mortgage for the amount. The mortgage was in default, and proceedings were taken upon it; they were stayed by *Pomeroy's* note indorsed by me being given; and there was another transaction of small amount between *Pomeroy* and *Murray*, on which I was indorser. *Pomeroy* left the country in 1859, and I then got up the indorsed notes and gave my own note. I made payments of interest on that note from time to time, and finally it was barred by the Statute of Limitations. Mr. *Murray* foreclosed his mortgage against *Pomeroy* and recovered the property back, and I then took up the old note and gave the new one payable at one day. I was under no legal obligation to give the note. I had frequently conversations with Mr. *Murray* after the first note was outlawed, and he said he hoped I would pay it to his wife when I was able; that he had given it to her. That was the first note that was barred. When I signed the new note at one day, he said it was his wife's. The only thing I can recall about it afterwards was his once or twice asking me when I was going to pay his wife, mentioning her by her Christian name. I have under-

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1882. stood for the last ten years that the debt belonged to Mrs. *Murray*.”

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 — *Purdum* }
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Murray.

George Oliver and *William Oliver*, two nephews of the testator, were also examined before the Master. The former, in the course of his evidence, swore that the “testator died on Saturday, the 20th September, 1879. I went to the house to stop with him on the 16th of September, and I remained with him all the time except about half a day * * He had some conversation with me as to the disposition of his property. His wife, on the day before he made his will, claimed that his notes and a mortgage belonged to her, and he said that they did not, and if she claimed them he would disinherit her, and leave the place to Mr. *Jeffry*. He said there would be little money without the notes and mortgage. Mr. *Purdum* came out the next day. Mrs. *Murray* came to him in my hearing and told him that Mr. *Murray* was insane, and that the notes were hers. Mr. *Murray*, when he heard that Mr. *Purdum* had come, sent for him to his room. * * Mr. *Purdum* asked him in my presence what money there was, and he said about \$2,000 in the bank. I had my arm about the testator at the time, supporting him while Mr. *Purdum* took down a memorandum. He told Mr. *Purdum* what he wanted done. He said he wanted the mill property and all the implements to go to *William Oliver*, the part of lot No. 11 in London to me, and the rest to *Richard Turner*; and \$4,000 to Mrs. *Murray*; and he said there were about \$2,000 in the bank besides the notes and the mortgage. Mr. *Purdum* asked him how much he thought her share would come to in the whole estate, and then Mr. *Purdum* put down \$5,000 for her instead of \$4,000, and he said nothing about that. * * I was with the testator until the day of his death, but was not present at his death. He was sensible up to the time I left on the day he died. I left on that day a little after twelve, and he died about five in the afternoon. * * The

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residue was to be distributed equally between the *Oliver* family, *Richard Turner* and *Mrs. Murray*; each person was to get an equal share. \$4,000 was the amount that the testator first said that *Mrs. Murray* was to have. That was before *Mr. Purdom* made the will; he asked the testator what her share of the estate would amount to—if he thought it would amount to \$1,000, and the testator thought it would; and then *Mr. Purdom* put down \$5,000 for the widow. The produce of the *Ridout street* property was to be given to the widow; if it amounted to \$5,000 she was to have that, and if only \$4,000, then the other \$1,000 was to be made up to her. * * The testator did not intend to give *Mrs. Murray* \$5,000; it was not at his request that it was changed from \$4,000. He said that *Mrs. Murray* was to have \$4,000 and more, and *Mr. Purdom* asked how much more, and if as much as \$1,000, and the testator said it might be. *Mrs. Murray*, on the day the notes and mortgages were mentioned, said that she would keep them. There was no will spoken of then, and it was not intended to make a will. The testator was going to make deeds to me and *William*, and she refused to sign them unless the notes and mortgage were given to her. The idea was to distribute the estate without a will. *Richard Turner* was then to have a deed also, and my other brothers and sisters to have the money amongst them without any will at all. When she objected he determined to make a will.”

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Statement

William Oliver swore that he lived in the house with the testator. “He first spoke to me on Monday, the 15th, about his affairs not being settled. He said he was dying; that his affairs were not settled, and that he would have them settled now. On the following day he saw *Mrs. Murray* go into the room next where he was, and he called her once or twice and she did not answer, and he told me to go and tell her to come in, that she was interested in this matter as much

1882. as I was. I asked her if she did not hear him calling, and she said, quite snappish, 'what does he want?' I told her he wanted to talk over his affairs, and told her to go in. He then said to her, '*Ann*, what does all this mean; we talked this all over before, and did you not agree to it?' She said, 'you promised me part of the money and notes,' and he said, 'no, *Ann*, I never did.' He then stated that he wished to give her \$4,000 and appoint Mr. *Russell* to buy her a cottage for \$1,000, and she would not agree. He told me on that day that he had \$2,000 in the Dominion Savings Bank, and between \$1,000 and \$1,200 of promissory notes, and a mortgage of \$300, and he requested her to bring the notes until I would count them up to see what there were; she refused to bring them, stating that there was time enough for that yet. He told her to go and bring them immediately; that I did not want the notes, but wanted to count them up and they would be given up. She then brought them and cast them down on the table. I counted them up then, and the mortgage, and I think that including the mortgage, there were between \$1,000 and \$1,300. That was pretty near all that occurred on that day. * * The will was drawn on Wednesday, the 17th. Mr. *Purdom* drew it. I told Mr. *Murray* that he had come, and he told me to ask him to come in. Mr. *Purdom* proceeded to take notes as to how he wanted his will drawn. He went out and arranged them in another room and came back and read it to Mr. *Murray*. I said to Mr. *Purdom* that the notes and money in the bank ought to be mentioned in the will, and he said: 'That is all right; that will come in with the residue.' Mr. *Purdom* asked Mr. *Murray*, 'is that all you give your wife?' and he said: 'Yes, all, and a good all, and if I had ten times that, and ten times that again, she should not have another cent.' I had no conversation with Mr. *Murray* after the signing of the will as to these notes."

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—Purdom
v.
Murray.

Statement.

The finding of the Master upon this claim of the widow, was as follows :

“ With respect to the note of the 25th April, 1877, for \$1,437, made by Mr. *Parke* to the late Mr. *Murray*, the testator, I have, after careful comparison of the several cases cited in the argument, arrived at the conclusion that the evidence before me is sufficient to shew that this debt was not and is not an asset of the testator’s estate. In my mind, there is not the least doubt that the proper construction to be put upon this asset is that it was a gift *inter vivos*. This view being, I think, sustained by the evidence of Mr. *Parke* in corroboration of that of the widow of the testator, whose separate property this debt appears to have become at a time long prior to the death of the testator. If any doubt as to this construction remained after the reading of the evidence of Mr. *Parke*, I think the fact that in summing up the notes as stated by *William Oliver* on the 16th September, 1879, this note was not mentioned at all by the testator, and in no way appears to have entered into his calculations, would set such a doubt at rest.

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 Re Murray
 —Purdom
 v.
 Murray.

“ As to this note, I therefore find that it forms no part of the testator’s estate, but was a gift to his wife made long prior to the making of his will.

Statement.

“ I do not consider that the non-indorsement of this note by the testator to his wife in any way affects the question of the gift *inter vivos*. If I am right in finding that it was a gift *inter vivos*, there need be no difficulty in overcoming the want of indorsement ; and the maker of the note does not deny his liability to the legal holder.”

From this finding of the Master the plaintiffs appealed.

Mr. *Purdom*, and Mr. *H. Cassels*, for the appeal, contended that the note was not the property of the defendant *Ann Murray* in the testator’s lifetime, as shewn by the evidence of *George* and *William Oliver*, who proved that the night before his death the testator spoke of this note as part of his estate, and said if his wife claimed the notes he would disinherit her ; that she

1882. refused to sign deeds unless the notes were given to her, and, in consequence the deeds were not signed; that the testator denied having given the notes to the defendant, and that the testator told her to bring the notes and then have the amount added up, that he might form an estimate of what his assets were; and said that what he had given his wife in the will was all he intended to give her; that the evidence of *Parke* also shewed that he made a payment to testator shortly before his death; that under these circumstances the evidence of the defendant was not sufficient by itself to prove the gift, and it was uncorroborated, as the statements made to *Parke* by the testator did not amount to a recognition of a gift to his wife of the note in question. It was also contended that the possession of this note by the defendant was not sufficient to give her the ownership of it in the absence of plain evidence of a gift, and in the absence of indorsement; and especially in view of the circumstance that this note was in her possession with other notes of the testator, and that the note could not be transferred except by indorsement: *Byles* on Bills, 11th ed., 143. That the onus was on the defendant to prove clearly and conclusively the alleged gift, and she had failed to establish her right thereto; on the contrary, the evidence shews that the testator retained to the last his interest in the note, and absolute control over it: *Warriner v. Rogers* (a).

Statement.

Mr. *Plumb*, for the infant defendants.

Mr. *Flock*, for Mrs. *Murray*, contra, insisted that the evidence shewed that the note in question was the property of the defendant, in the testator's lifetime, and that her evidence shewed the note belonged to her, and her evidence in this respect was corroborated by that of Mr. *Parke*, proving statements made by the testator and a payment made by him to her in the testator's lifetime, and was further confirmed by the counting of

(a) L. R. 16 Eq. 340.

the notes excluding this one: *Byles* on Bills, pages 127 and 179; *McEdwards v. Ross (a)*, *Winter v. Winter (b)*, *Bland v. Maculloch (c)*, *Barton et al. v. Gainer (d)*. And it distinctly appeared that although the *Olivers* were endeavouring to secure the testator's property, and they knew of the existence of some claim against *Parke*, still they made no claim to it as an asset until after the testator's death; and it was shewn that the note was in the possession of the defendant during the lifetime of the testator, and payment only sought on her account.

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 Re Murray
 — Purdom
 v.
 Murray.

BLAKE, V. C.—I have read over the evidence in this case, and am not able to conclude that there is proved a clear irrevocable gift on the part of the husband in favour of the wife. The depositing this note with other notes with the wife, or the allowing her to have them, when the note is payable to order and is not indorsed, is not a clear irrevocable gift. Then this note was renewed and still made payable to the order of the husband and not of the wife. The statement made by the husband at the time the will was made prevent to my mind the present being brought within the class of cases in which the gift has been allowed. The wife says: "The notes were given to me on the day before Mr. *Murray's* death." It seems clear from the surrounding evidence that this cannot be so. Although Mr. *Parke* says this note was spoken of as Mrs. *Murray's*, yet the conversation was very general and the statements then made may be attributed to the desire of the deceased to obtain a payment on account, and to the thought that this would be better effected if he pressed the debtor for payment on behalf of another rather than on his own. I think the appeal should be allowed with costs.*

March 19th.

Judgment.

(a) 6 Gr. 373.

(b) 9 W. R. 747 4 L. J. N.S. 639

(c) 9 W. R. 65.

(d) 3 H. & N. 387.

* Since argued in Appeal.

1882.

ANDERSON V. BELL.

Will, construction of—Distribution of estate—Accumulation—Per capita or per stirpes.

The testator bequeathed his residuary estate, all other property, in lands, mortgages, and stocks, to his grandchildren, "the children of *J. C.*, and of my daughter, *A. J. B.*, wife of *D. B.*, share and share alike, on their coming of the age of twenty-five years, to be finally determined and paid to them on the youngest coming to the age of twenty-five years. Provided, nevertheless, that each one on coming to the age of twenty-five years receive a portion of not more than half what their share will be on the youngest coming of age." (Then directions were given as to keeping books of account and managing the estate.) "And when the books so audited shew the revenue of my estate, after paying the before mentioned bequests, taxes and other charges on the same, amounts to £500, then half of such revenue or income be divided, share and share alike, between the families of my son, *J. C.*, and the family of my daughter, *A. J. B.*" (The other half going into the estate.)

Held, (1) that the children referred to took *per capita*, and not *per stirpes*; (2), that when the eldest attained the age of twenty-five years, he was entitled to receive one-half of his share, payment of which could not be delayed, and that date must be taken as the period at which those to take were to be ascertained; and that any child born subsequent to the time the eldest child attained twenty-five was excluded, and all born before that period were entitled to share in the estate; (3), that the children did not take vested interests—the gift to each being contingent on attaining twenty-five; (4), that twenty-five was the age at which the parties became entitled to an arrangement as to the amount of their shares; (5), that the trustees could charge the shares of any who had been overpaid with the excess of such payments.

This was a suit instituted by *William Anderson* and *John William Gamble Whitney* (trustees), against the parties interested under the will of the late *Robert Cathcart*, for the purpose of obtaining a construction of such will.

Statement.

The clause of the will giving rise to the contention between the parties, is set out in the judgment.

Mr. Mortimer Clark, for the plaintiffs

Mr. *T. Ferguson*, Q.C., Mr. *J. Hoskin*, Q.C., Mr. *Boyd*, Q.C., Mr. *Moss*, and Mr. *Ewart*, for the several defendants.

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BLAKE, V. C.—The material portions of the will in question are: “And I leave and bequeath all other property in lands, mortgages, stocks, to my grandchildren, the children of *James Cathcart*, and of my daughter *Ann Jane Bell*, wife of *Duncan Bell*, share and share alike, on their coming of the age of twenty-five years each, to be finally determined and paid to them on the youngest coming of the age of twenty-five years; provided nevertheless, that each one on coming to the age of twenty-five years receive a portion of not more than one-half what their share will be on the youngest coming of age * * and when the books so audited shew the revenue of my said estate, after paying the before mentioned bequests, taxes and other charges on the same, amounts to five hundred pounds, that one-half of such revenue or income be divided share and share alike, between the family of my son *James Cathcart* and the family of my daughter *Ann Jane Bell*, and that the other half of such annual income, after paying all charges, be put into the general funds of my estate, and be managed by them as part of the said estate, and also with the other estate to be divided as I have hereinbefore directed * * *

The following are the lands and mortgages conveyed by me in trust to my son *James Cathcart* and my son-in-law *Duncan Bell*, to be managed by them for the benefit of their families as hereinbefore set forth.”

Judgment.

In *Parkinson v. Parkinson (a)*, it was held, under a devise “to be divided share and share alike among five sisters * * and their respective families,” that each sister and her children living at the testator’s death was entitled to one-fifth share. In *Barnes v. Patch (b)*,

(a) 1 Sim. N. S. 242.

(b) 8 Ves. 604.

1882. are the words, "the remainder of my estate to be equally divided between brother *Lancelot's* and sister *Esther's* families." Sir *William Grant* says: "The only construction is, that by the word 'family' children are meant, and if that is the construction, does it not follow that the division must be *per capita*? That construction excludes the parent." This case is approved of in *Heron v. Stokes* (c). In *Lincoln v. Pelham* (d), Lord *Eldon* says: "That rule has been applied in many instances upon which doubts have been strongly, raised for instance, a gift to a brother and the children of a deceased brother, who without a will would take *per stirpes*; yet, it has been held that, though the law would have given it in moieties, that is not the effect of an express bequest." In *Pigg v. Clarke* (e), the Master of the Rolls thus defines the meaning of the word "family": "What then is the primary meaning of 'family'? It is 'children;' that is clear upon the authorities which have been cited; and independently of them, I should

Judgment. have come to the same conclusion. I hold, therefore, that the children of the testator can alone take under the words 'my said family.'" This view coincides with that of Sir *George Turner*, as expressed in *Gregory v. Smith* (f): "Now, I think the meaning of the word 'family,' is *primâ facie* children, and that that construction ought to be adhered to, unless some reason be found in the context of the will for extending or altering it. * * Whether, originally, under a gift to *A.'s* family or the family of *A.*, *A.* should not have been included in the benefit of the bequest, I may possibly doubt; but it will be much better to abide by the decision in *Barnes v. Patch* than to draw any distinction between the cases, for which there is no sufficient ground."

So far as the corpus of the estate is concerned, this

(a) 2 Dr. & War. 98.

(b) 10 Ves. at 176.

(c) 3 Ch. D. 673.

(d) 9 Ha. 708.

will contains a gift "to my grandchildren * * share and share alike." And I think each child takes an equal share, and the division must be *per capita*.

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See also *Flood* on Wills, 512; *Theobald*, 149; 2 Jarm. 181; 2 *Williams* on Executors, 1129, 1518; *Wood v. Wood* (a); *Re Terry's Will* (b); *Dowding v. Smith* (c); *Abbaye v. Howe* (d); *Congreve v. Palmer* (e); *Ling v. Smith* (f); *Neff's Appeal*, (g).

The number of children must be ascertained at the time of the death of the testator, and only those are entitled to share. See *Gimblett v. Purton* (h); *Re Gardiner's Trusts* (i); 2 *Williams* on Executors, 1095. It does not follow that because the corpus of the estate is to be divided *per capita* the income should be thus applied: *Nockolds v. Locke* (j). The question of the distribution of the income has been disposed of by the Chancellor, and whatever may be my opinion as to the construction of the will on this point, I cannot do otherwise than follow the conclusion arrived at as to the construction of the will on this point. I am bound by this decision, no matter whether there may be persons before the Court other than those present on the former record or not (k). I cannot interfere with that

Judgment.

(a) 3 Ha. 65.

(b) 19 Bea. 580.

(c) 3 Bea. 541.

(d) 1 DeG. & Sm. 470.

(e) 16 Eea. 435.

(f) 25 Gr. 246.


(g) 52 Penn. St. R. 326.

(h) L. R. 12 Eq. 427.

(i) L. R. 20 Eq. 647.

(j) 3 K. & J. 6.

(k) In December, 1869, the case of *Bell v. Cathcart* came before the Chancellor. That case was instituted by *Duncan Bell*, the father of the infant defendants *Bell* in the present case, and was brought to obtain the opinion of the Court as to the right of Mrs. *James Cathcart* to receive payment of certain moneys in addition to the amount payable to her husband during his life time; and also her right to the possession of certain premises in Toronto during the life time of the testator's widow. After disposing of these questions his Lordship remarked: "Another question arises upon the distribution of the revenue arising from the general fund, as the will calls it. As to that, he provides that when, after paying bequests,

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ruling, and, deciding only the point that is open to me, leave the parties by rehearing to raise the questions discussed on the hearing as to the income. Costs out of the estate.

The cause was subsequently reheard before the full Court.*

The same counsel appeared for the parties respectively.

In addition to the cases referred to on the hearing, and in the judgment: *Stansfield v. Hobson* (a), *Payne v. Parker* (b), *King v. Keating* (c), *Lincoln v. Pelham* (d), *Walker v. Moore* (e), *Re Bartholomew* (f), *Shrimpton v. Shrimpton* (g), *Balm v. Balm* (h), *Oppenheim v. Henry* (i), *Locke v. Lamb* (j), *Garratt v. Weeks* (k), *Crone v. Odell* (l), *Burt v. Hillyar* (m), *Re Hutchison and Tennant* (n), *Brett v. Horton* (o), *Sinnott v. Walsh* (p), were cited.

Judgment. taxes and other charges, the revenue from his estate shall amount to £500 a year, that one-half thereof 'be divided share and share alike between the family of my son *James Cathcart*, and the family of my daughter *Ann Jane Bell*' ; and as to the other half, he directs that it be put into the general funds of the estate, to be managed by his executors in a mode that he prescribes. My opinion is, that in the events which have happened, the general revenue of the estate reaching the prescribed sum at the death of *James*, his widow is entitled to one-half of one-half of such general revenue, the family of the testator's daughter *Ann Jane Bell* being entitled to the other quarter ; and further that the sums are receivable upon the same footing as the rents and profits, as to which I expressed my opinion that they are receivable, subject only to their being applied to the purpose for which they are bequeathed by the will, but not subject to account."

* SPRAGGE, C., BLAKE and PROUDFOOT, V. CC.

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|-----------------------|----------------------|
| (a) 16 Feav. 189. | (b) L. R. 1 Ch. 327. |
| (c) 12 Gr. 29. | (d) 10 Ves. 166. |
| (e) 1 Beav. 607. | (f) 1 McN. & G. 354. |
| (g) 31 Beav. 425. | (h) 3 Sim. 492. |
| (i) 10 Har. 441. | (j) L. R. 4 Eq. 372. |
| (k) L. R. 20 Eq. 647. | (l) 1 B. & B. 449. |
| (m) L. R. 14 Eq. 160. | (n) 8 Ch. D. 540. |
| (o) 4 Beav. 239. | (p) Ir. R. 3 Ch. 12. |

BLAKE, V.C.—The parties having presented the following questions for the consideration of the Court, and for the purpose of determining the rights of those interested, ask the Court to dispose of them on the rehearing.

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1. Whether the grandchildren of the testator, namely, the children of *James Cathcart* and *Ann Jane Bell* are entitled in equal shares to the residuary estate to be divided *per capita* or *per stirpes*, and whether the income is divisible in the same manner.

2. Whether *Mary Bell*, born after the death of the testator, is entitled to share with the other children.

3. Whether the children take a vested or a contingent interest.

4. Whether they can call on the trustees for settlement of their shares at the age of twenty-one or twenty-five.

5. Whether the shares of those who may have been overpaid by the trustees in the past can be charged with the excess.

Judgment.

I have read over the cases cited, and the passages in Messrs. *Jarman*, *Hawkins*, and *Theobald*, and, after careful perusal of the will, am of opinion that the questions should be answered as follows:

1. The children in question take *per capita*, and not *per stirpes*. This is very clear as to the residue; and as *Barnes v. Patch* has been so long followed, we must take it now to be the rule that where the word "family" is used it *primâ facie* embraces but children, and involves their taking *per capita*, unless there be, which is not present in this will, something to controvert this *primâ facie* result.

2. There was no child to take at the date of the death of the testator. When the eldest became of the age of twenty-five he was entitled to his share. This payment cannot be delayed, and that date must be taken as the period at which those to take are to be ascertained. *Mary Bell* was born before *Thomas Dick*

1882. *Bell*, who was the first to attain that age, became twenty-five, and she, therefore, is entitled to share in the estate. Any child born after the attaining of twenty-five by *Thomas Dick Bell* is excluded.

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3. The children do not take vested interests.

There is not an absolute direction to pay, and a mere postponement of the period of enjoyment; but in the gift itself the time for enjoyment is defined, and thereby is made contingent on attaining twenty-five.

The provision as to the income does not aid the vesting, as this is a separate dealing, and an independent provision of a fixed portion, which would not have the effect of accelerating the vesting or avoiding the condition on which it is to be taken.

The share of the residue, therefore, goes only to those who attain twenty-five.

4. Twenty-five is the age at which the parties become entitled to an arrangement as to their shares.

5. The trustees can charge the shares of those over-
Judgment. paid with the excess of such payments.

Those not before the Court are not bound by the previous litigation. It is reasonable that the costs of this suit to obtain the opinion of the Court as to the proper construction of the will should be borne in the usual way—out of the estate. This includes the costs to all parties of this rehearing.

PROUDFOOT, V.C., concurred.

SPRAGGE, C., concurred, except as to the disposition of the income of the estate.

Order on
re-hearing.

“Declare that according to the true construction of the will of the testator, *Robert Cathcart*, after payment of the bequests mentioned in his said will, taxes and all other charges, the grandchildren of the testator, namely, the children of *James Cathcart* and *Ann Jane Bell*, are entitled in equal shares to the revenue and capital of the residuary estate of the testator *per capita*, and not *per stirpes*.

“Declare that the defendant *Mary Bell* is entitled to share in the said estate equally with and in the same manner as the other grandchildren of the testator.

“Declare that the said grandchildren are not entitled to call on the said plaintiffs for settlement of their several shares in said estate until they shall have respectively attained twenty-five years of age, and that their interests in the said shares are contingent upon their respectively attaining the said age of twenty-five years.

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“Declare that the plaintiffs are at liberty to charge the shares in said estate of those grandchildren who have already been overpaid with the excess of the overpayments.

“Order and decree that the decree made herein on the twenty-eighth day of September last be varied in accordance with the foregoing declarations.

“Costs of all parties out of the estate.”

[*Affirmed on appeal, 9th February, 1883.*]

SANSON V. THE NORTHERN RAILWAY COMPANY.

Nuisance—Injunction—Acquiescence—Laches.

The plaintiff was owner of a steam vessel plying on Lake Couchiching, and accustomed to run into the River Severn, where it leaves the lake, and to lie in a basin alongside a wharf at Washago. The defendants, in extending their line of railway, constructed a bridge across the river which completely obstructed the entrance, and caused, it was alleged, special damage to the plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge, which was somewhat too small for its intended purposes. Some correspondence took place while the bridge was in construction, by the plaintiff personally and through his solicitor with the defendants' general manager, in the nature of protests, but the bridge had been in use for several years without action on the part of the plaintiff, when a bill was filed praying that it might be declared a nuisance, and that the defendants might be ordered to abate it.

Held, that by the delay in taking action, and otherwise, there had been unequivocal acquiescence in the action of the defendants, and the bill was therefore dismissed, with costs.

This was a bill filed 15th April, 1880, by *David L. Sanson* against *The Northern Railway Company of Canada* and *Her Majesty's Attorney-General of Ontario*, setting forth, amongst other things, that in

1881. the Spring of 1874, the Northern Extension Railway Company, afterwards amalgamated with defendants' Company, commenced the construction of their line of railway eastward of Lake Couchiching, which forms the outlet of Lake Simcoe, the lake being drained by the river Severn, which river formed the natural outlet and was navigable by sailing vessels and steamers for some distance after leaving Lake Couchiching, and for a much longer distance down its course by smaller vessels; that the village of Washago was built on one or more islands formed in the lake where the river leaves the lake, and such village was convenient for the purposes of a port or shipping place, and considerable shipping business was done there, and for the convenience of such navigation a wharf was constructed in the river, at which vessels were moored and loaded. That in 1874, the company desiring to construct their line of road across said river, constructed a series of bridges across the several branches of the river for the use of their railway, which were built on so low a level and the piles or piers were placed so close together as to render it impossible for vessels or large boats to navigate the river or even to approach the said village of Washago, and such bridges were permanent structures unprovided with any apparatus or means for even occasional use of the river by boats and vessels.

Statement.

The bill further stated that at and prior to the construction of such bridge the plaintiff owned a steamer called the "Cariella," and had for several years previously thereto run such steamer to the said wharf and to mills and other places down the river Severn, and had caused the said steamer to be plied as a public steamer for hire and for carrying passengers and goods between the said wharf at Washago, and such other places down said river and the town of Orillia, where she connected with other steamers and means of transportation, whereby the public were greatly conven-

ienced, and the plaintiff made considerable profit. That the plaintiff objected at the time to the construction of said bridges, and notified the company not to construct their line of railway on such bridges, in such a way as to obstruct the navigation of said river, but the company refused to alter their plans and completed the bridges in spite of the protests of the plaintiff; and the plaintiff submitted that the construction of such bridges and line of railway was a nuisance and caused great damage to the general public, and caused the plaintiff special and particular damage in respect of his said steamer; and that he was, in consequence of such nuisance, unable to run his said steamer with profit, and could not carry heavy freight to Washago, or any freight at all to points lower down said river.

The bill further stated that the plaintiff and others had from time to time applied to the defendant company to remove such obstructions, and the defendant company, by promising to attend to the matter and to procure other accommodation for the public, induced the persons so complaining to refrain from taking steps to compel the removal of such obstructions; and that the plaintiff had no sufficient or adequate remedy at law in the premises; and he submitted that the said nuisance and obstruction ought to be removed, and that the defendants' company ought to be enjoined from in any way hindering or obstructing the free navigation of the said river and lake, and in any event the plaintiff submitted that he was entitled to damages for the special loss sustained by him by the wrongful acts of the defendant company.

The prayer of the bill was, (1) that it might be declared that the said bridges were a nuisance and obstruction to the free navigation of said river and lake; and that the plaintiff had sustained special damage thereby; (2) that the defendant company might be ordered to abate such nuisance, and remove the obstructions to the free navigation of said lake and river;

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and, (3) the defendant company ordered to pay such damages and costs; and for further and other relief.

The defendant company answered, setting up that the only part of the bridges calculated to affect navigation was the middle branch bridge, as the other parts of the river crossed by other portions of said bridges were not at any time navigable; that such middle branch bridge was constructed in 1874, and a line of railway then placed thereon, and the same had ever since been used by the defendant company with locomotives and cars as a railway.

Statement.

The defendants further set up that prior to the construction of said bridges, a correspondence took place between the plaintiff and the Managing Director of the Company, with reference to the location of such bridge; and the plaintiff then agreed to the location thereof, provided (1) that the Government of Ontario would dredge out the bottom of the said middle branch so far as to form a basin immediately west of the location of the bridge; and (2) that the company would construct a wharf there equal in capacity to the one cut off by said bridge; and that such conditions were duly performed, and that the plaintiff had ever since the erection of such wharf used the same with the said steamer, and had never until recently made any complaint about the location of said bridge. The answer further set up that the *Northern Extension Railway Company* and the defendant company had, upon the faith of such arrangement, expended large sums in the erection of said bridges, and submitted that plaintiff was estopped by his conduct from asserting the claims set up by the bill of complaint; and further, that by his acquiescence and delay the plaintiff had disentitled himself to any relief against them.

Several letters and telegrams were produced at the hearing, which are below set forth, and some of which are referred to in the judgment.

Orillia, April 2nd, 1874.

1881.

FRED. CUMBERLAND, Esq.,

Managing Director N. R. R. of Canada, Toronto.

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Dear Sir.—Some time ago, the Captain of my steamer and myself went to Washago to see about removing two or three large stones at the Washago wharf, as we broke a wheel on them last summer, and we saw that men were at work at your railway bridge. I then saw Mr. Jones on the subject; he said they would only go a short way with the piles and leave the channel open until a basin was dredged out large enough to swing the steamer round in. But I understand they are going on with the work across the channel. If so, and my boat goes in there, she must remain. The basin must be dredged before the channel is closed up. I am laying out a considerable sum on the steamer and expect to commence her regular trips on the 25th of this month. I do not wish to give unnecessary trouble, but I would be in a fix if the channel was closed, and so would your company for closing it up.

If the bridge had crossed a hundred yards lower down, it would not have stopped navigation.

Yours respectfully,

D. L. SANSON.

Toronto, April 4th, 1874.

Dear Sir.—I am in receipt of your letter of the 2nd inst., having reference to the Washago government wharf. The proposals for the works at that point have been approved by the Government. They include the dredging of a basin for which an appropriation has been made, and we are assured by the Public Works Department, that the work will be immediately executed. Thereupon a new wharf will be instantly constructed, so that we hope no inconvenience will arise to the lake traffic. I will give personal attention to this matter.

Statement.

Yours faithfully,

FRED. CUMBERLAND.

D. L. SANSON, Esq., Orillia.

Toronto, April 4th 1874.

Chief Engineer, *In re* Washago wharf.

We must be very careful about this or we shall get into litigation and damages. Read *Sanson's* letter carefully. I think you should get an order from the Board of Works for the work they approve. * * * The wharf is Government property. I understood you to say that *McKellar* approves of our intentions; if so, it would be well to get an official letter to that effect.

F. W. C.

Orillia, April 6th, 1874.

Dear Sir.—In answer to your letter of the 4th inst. to Mr. *D. L. Sanson*, I have been instructed by him to say that he requests the Northern Railway Company or its Extension not to obstruct the entrance of the Severn river at the place commonly known as the

1881. Washago wharf, by continuing the present line of railway across the river just above the wharf thereof, preventing Mr. *Sanson* from making use of the said wharf, and occasioning him great loss. He only wishes the channel to be left clear till the Government dredges the basin and puts up the wharf as in your letter ; of course, if you persist in going on with the railway bridge and obstructing the river, we will be obliged to take out an injunction in Chancery, and prevent the contemplated obstruction. What Mr. *Sanson* is asking is not unreasonable, and therefore we hope his demand will be complied with without any further trouble.

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Yours, SAMUEL S. ROBINSON.

F. W. CUMBERLAND, Esq.,
Manager of the N. R. W. Co.

To SAMUEL S. ROBINSON, Orillia.—[Telegram.]

We had already ordered the work to be stopped out of regard to you, but the wharf is not *Sanson's*, and we have the consent of the owner to our works ; the object of my telegram was to consult *Sanson's* wishes and interests in a friendly spirit, but you seem to want a grievance.

FRED. CUMBERLAND.

From Orillia,—F. W. CUMBERLAND, Esq.

Your telegram received, channel must not be closed until basin is dredged and wharf built. If work is not stopped, will take out injunction to-morrow.

SAMUEL S. ROBINSON,
Solicitor for D. L. Sanson.

Mr. D. L. SANSON, Orillia.

Would like you to come down and see the drawings. Am anxious to protect your interest. Can you come to-morrow or when ? Answer immediately.

FRED. CUMBERLAND.

Orillia, April 9th, 1874.

F. W. CUMBERLAND, Esq., Toronto.

My Dear Sir.— * * I am very desirous to see your road pushed further on, and always have been even to my own injury, as far as making money is concerned. Mr. *Robinson* sent me the telegram he received last night. I was under the impression that my request or demand was a reasonable one, viz., dredge basin and give us wharf accommodation ; then we would try if the steamer would swing round in it as easy as it does in the present basin, when I would be perfectly satisfied on my own part. Some years ago I laid out a considerable sum at the Washago wharf and storehouse. I would be ruined if my steamer had to stop running till the dredging was done, which may take longer than expected. I would strongly advise you to give this matter your consideration, and perhaps put a swing to the bridge. I

would regret exceedingly to see you put to any trouble, but there are other persons here who view this matter differently.

Yours respectfully, D. L. SANSON.

Toronto, April 10th, 1874.

My Dear Sir.— * * * As to the Washago wharf, we had purposely omitted the piles which would have interfered with the approach of the Cariella, so that we had not forgotten your interests.

The Board of Works have promised to get at the dredging at once, but there may be some delay. The new wharf, however, will be constructed at once, so that I hope all will be right before long.

Yours truly, FRED. CUMBERLAND.

D. L. SANSON, Esq., Orillia.

August 18th, 1874.

Dear Sir.—It is of great importance that we should be able to cross at Washago within a few days, will you kindly inform me if the contract for dredging is so far completed that I can proceed with the bridge.

Truly yours, OWEN JONES.

F. N. MOLESWORTH, Engr. of Public Works, Ont.

Barrie, Ont., January 2nd, 1874.

Dear Sir.—Mr. D. L. Sanson of Orillia has been with us in connection with the obstruction caused by your Company to the mouth of the Severn river near Washago, in the shape of a bridge, which in no respect apparently complies with the requirements of the law. Unless, therefore, immediately arranged, we shall have to proceed to obtain its removal and stop its use so as to enable Mr. Sanson and others interested to use the river as formerly with steamers and otherwise.

Statement.

Yours truly, McCARTHY, BOYS & PEPLER.

F. W. CUMBERLAND, Esq., Toronto.

Toronto, Jan. 5th, 1879.

Dear Sirs.—I am in receipt of yours of the 2nd, *re* alleged claim of D. L. Sanson, in connection with the Washago bridge, and would thank you to advise me specifically of the claim which Mr. Sanson desires to make upon us in order that I may consult our Executive Committee, and thereafter again communicate with you.

Yours truly, FRED. CUMBERLAND,
General Manager.

To Messrs. McCARTHY, BOYS & PEPLER, Barrie.

Barrie, Ont., 6th Jan., 1880.

Re Sanson v. Northern Railway Company.

Dear Sir.—We have yours of yesterday. Mr. Sanson's complaint is simply that in consequence of the nature of the construction of your

1881. bridge across the Severn river at Washago, the river is blocked and navigation prevented, and he is unable to use the river as formerly, or in fact at all with his steamer, to connect with mills, &c., up the river.

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Yours faithfully,

MCCARTHY, BOYS & PEPLER.

F. W. CUMBERLAND, Esq., Toronto.

Toronto, Jan. 9th, 1880.

Re Sanson v. Northern Railway Company.

Dear Sirs.—Adverting to your letter of the 6th inst., upon this subject, I beg to say that, believing that we have a complete answer and acquittance to the claim alleged by Mr. *Sanson*, we have only to say that our solicitor, Mr. *D. G. Boulton*, will accept service of any process.

Yours truly, FRED. CUMBERLAND.

General Manager.

Messrs. MCCARTHY, BOYS & PEPLER,
Solicitors, Barrie.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Barrie in the Autumn of 1880.

Mr. *McCarthy*, Q. C., and Mr. *Pepler*, for the plaintiff.

Statemen

Mr. *G. D. Boulton*, and Mr. *W. Cassels* for the defendants.

Benjamin v. Storr (a), *Blagrove v. Bristol Water Works Co.* (b), *Spencer v. The London and Birmingham R. W. Co.* (c), *Original Hartlepool Coleries Co. v. Gibb* (d), *City of London v. Bolt* (e), *Wandsworth Board of Works v. London and South Western R. W. Co.* (f), *Guelph v. The Canada Co.* (g), *Cline v. Cornwall* (h), *Watertown v. Cowen* (i), *The Attorney-General v. The International Bridge Co.* (j), *Cull v. The Great Western R. W. Co.* (k).

(a) L. R. 9 C. P. 400.

(c) 8 Sim. 193.

(e) 5 Ves. 129.

(g) 4 Gr. 632.

(i) 4 Page 510.

(b) 1 H. & N. 360.

(d) L. R. 5 Ch. D. 713

(f) 8 Jur. N. S. 691.

(h) 21 Gr. 129.

(j) 22 Gr. 298; and 27 Gr. 37

(k) 10 Gr. 496.

SPRAGGE, C.—The plaintiff complains of the construction of the defendants' railway bridges across the River Severn at the point where the waters of Lake Couchiching, at its northern extremity, pass by the river to the Georgian Bay. It is the bridge over the middle channel that is chiefly complained of.

1881.

Sanson
v.
Northern
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May 21.

The plaintiff is, and has been for a number of years, the owner of a small steamer about seventy-five feet long, called the *Cariella*, which has plied and still plies between the southern end of the lake and the village of Washago, which lies at the point to which I have referred.

Before the construction of the bridge the *Cariella* and other vessels navigating the lake used to pass further down the river than now, by reason of the construction of the bridge, they can do, and were moored at a wharf which is now on the river side of the bridge, and which the bridge prevents them from reaching.

The bridge was under construction in 1873 and 1874, and the channel finally closed in August or September of the latter year. Judgment.

It was evident to the defendants' engineer constructing the railway, and to Mr. *Cumberland*, the managing director, and no doubt to the plaintiff and others also, that the construction of the bridge and of its approaches would, as Mr. *Cumberland* says in his letter of the 17th of March, 1874, to the Commissioner of Public Works, "necessitate some re-arrangements of the wharf accommodation at Washago," and accordingly in that letter he suggests, referring to a sum of \$1,000, which he says he understands to have been appropriated for dredging and wharfage works at Washago, "that expenditure should be made in accordance with the changed circumstances," and recommends an early prosecution of the work.

What we have next is correspondence between the plaintiff and Mr. *Cumberland*. [The Chancellor here

1881. read the letter of 2nd April, 1874, and the answer thereto of 4th April, above set out.]

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v.
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The plaintiff's great apprehension appears to have been that the channel would be closed by the piers of the new bridge before the dredging for the new basin was done, and the new wharf built; for we find him writing through a solicitor, Mr. *Samuel S. Robinson*, to Mr. *Cumberland* two days after the date of *Cumberland's* letter to him. After requesting the railway company not to obstruct the entrance of the river the writer says, speaking for the plaintiff, "He then wishes the channel to be left clear till the Government dredges the basin, and puts up the wharf as in your letter," and he threatens an injunction if what he asks is not complied with.

Telegrams were then exchanged on the 8th between Mr. *Cumberland* and Mr. *Robinson*. [Set forth above.]

Judgment.

The next thing is a letter from plaintiff to *Cumberland* of the following day, the 9th of April, in which, after speaking of his father having an attack of paralysis, and of the illness of his mother, he goes on to say: "I am very desirous, &c." [Above set forth.]

The correspondence for that time closes with a letter from Mr. *Cumberland* of the following day, 10th of April. [Also set forth above.]

The work of pile driving at the channel was suspended on the 7th of April; and as Mr. *Owen Jones*, the defendants' engineer says: the channel was not closed till the dredging was done. The new wharf on the west or lake side of the railway bridge was also built. There was also some personal communication about that time, or shortly afterwards, between the plaintiff and Mr. *Cumberland*, as to which the parties differ. I have no reason to doubt that each gives fairly his own recollection of what passed. What really did pass is too uncertain, and I may add too vague to affect the character of the dealing between the plaintiff and the company.

With the exception of this personal communication 1881. nothing appears to have passed between the plaintiff and the company, or any of the company's officers, for nearly six years. In the interval, the *Cariella*, still owned by the plaintiff, and other vessels plied on the lake; using at Washago the new wharf and the new basin formed by the dredging above the bridge. The plaintiff seems not to have made any complaint to the company's manager, who says he has met him at intervals, probably four or five times within the last four or five years. The plaintiff himself says he did not move in the matter earlier because of the cost; and that he moves now because of the growth of Washago. Certainly neither of these reasons is a good one.

Sanson
v.
Northern
R. W. Co.

His complaint now, as explained in the letter of his solicitor of the 6th of January, 1880, is, "simply that in consequence of the nature of the construction of (the) your bridge across the Severn River at Washago the river is blocked and navigation prevented; and he is unable to use the river as formerly, or in fact at all, with his steamer to connect with mills, &c., up the river." This complaint is formulated in the tenth paragraph of the bill, in which he complains of the low level of the bridge as well as the closeness of the piles, preventing access to any branches of the river. Judgment.

It is clear from the evidence that the plaintiff saw the level upon which the bridge was being built: he said in his evidence he did not complain of it because it was no use. It is clear also, as well from the evidence of Mr. *Owen Jones*, the company's engineer, as from the correspondence, that his complaint was not of the *mode* of construction of the bridge, but of the company being about as he apprehended to drive in their piles, and close the channel then in use, before the new works, basin and wharf, were constructed.

He says now that a less space has been actually dredged out than was pointed out by the company's engineer as to be done, and one of the maps put in

1881. gives some confirmation to this. The engineer, however does not confirm what the plaintiff says, and says that he had not authority to make any representation on the subject. I think upon the evidence that there is more difficulty in *turning* a boat, when the wind is high, in the new basin than in the former one. I think also that the plaintiff suffers considerable loss and damage in getting wood on his boat, and stores and freight to and from his boat, from the difference of the level (some six feet) of the wharf and the bridge.

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v.
Northern
R. W. Co.

Judgment.

The evidence shews that the construction of the bridge has been a serious detriment to the plaintiff as vessel owner, but his difficulty is in making out a case against the railway company. The dredging was to be done not by the company but by the Government. I say nothing as to whether this Court would have restrained the closing of the channel until the new basin was constructed; but if it was, as constructed, an insufficient basin, the plaintiff should have complained then. It may be that upon a proper representation the Government would have enlarged it. He was on the spot in April. He did not go there in May or June, and allows several years to elapse without any complaint; and then complains, not of the insufficiency of the new basin, but of the bridge being so constructed as to prevent access to the old basin.

Whether he could obtain compensation then or now for loss and damage sustained from the level of the bridge being what it is I do not inquire. The question for me to decide is, whether he is entitled to a decree in this suit. What he asks is, that the railway bridges may be declared to be a nuisance and an obstruction to the free navigation of the lake and river, occasioning special damage to himself; and that the railway company may be ordered to abate the nuisance, and remove the obstruction to navigation.

The objections to this relief and to any cognate

relief are obvious. There was unequivocal acquiescence. 1881.
 The objections and protests as to the construction of the
 bridge alleged in the bill are not sustained in evidence,
 but are negatived; and a number of years have been
 allowed to elapse without complaint.

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I have seen the cases to which I have been referred
 by counsel on both sides, on the subject of acquiescence
 and laches. This case is a strong one against the
 plaintiff on both points. Judgment.

It is impossible under the circumstances of this case
 to grant the relief that the plaintiff asks; and the
 learned and able counsel who appeared for him at the
 hearing did not point out any sort of minor relief to
 which he was conceived to be entitled, nor do I see
 any. I cannot do otherwise than dismiss the bill, and
 it must be with costs.

1881.

KILLINS v. KILLINS.

Administration suit—Imperfect accounts—Costs.

In a suit for administration, it appeared that the personal representative had kept, very imperfect accounts of the estate, and that those brought into the Master's office had been made up partly from scattered entries and partly from memory.

Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs from the defendant up to the hearing, although no loss had occurred to the estate.

It was also shewn that the personal representative had invested the moneys of the estate in land out of the jurisdiction of the Court as well as on personal security, but no loss had been sustained, all having been repaid by the borrowers.

Held, that these facts did not constitute any ground for depriving her of the costs of suit subsequent to the decree.

Hearing on further directions in an administration suit.

Mr. *W. Cassels*, for the plaintiff.

Mr. *Moss*, for the defendant.

The facts appear in the judgment.

Oct. 12.

PROUDFOOT, J.—The suit is for administration of the affairs of the estate of an intestate. The decree was made upon motion and upon reading the examination of the administratrix.

The accounts have been taken, and although the administratrix has committed some irregularities, such as keeping imperfect accounts and lending money on personal security, and on land out of the jurisdiction, yet no loss has been sustained as the loans have been repaid.

The plaintiff asks that the administratrix should pay all costs, while she on the contrary contends that she should not pay any, that the suit should never have been instituted, and that the plaintiff should pay the costs.

The plaintiff proposes to read evidence taken before the Master that an account had been demanded and not complied with, before bill filed. But on further directions evidence taken before the Master cannot be read.

1881.

Killins
v.
Killins.

The Master reports that the administratrix has not kept proper books of account of matters pertaining to the estate, but no loss has resulted therefrom. In her examination before decree, and which was the only evidence taken before decree, the administratrix says she kept an account of what she paid the hired men for working the farm, and other expenses, but has not kept any accounts of proceeds, although she could readily make up a statement. She produced a book containing the memorandum of those expenses, and for maintenance of children. This book was made from another book also produced, and from some pencil entries in another account book, not then produced, and partly from recollection.

I think that this negligence in not keeping accounts, and where the matters of the estate are left to rest to some extent in her memory, and on scattered memoranda, is sufficient to justify the institution of the suit, and therefore that the defendant must pay the costs to the hearing.

Judgment.

As to the irregularities of the defendant in dealing with the funds of the estate, they were known to the plaintiff, and were set out in the bill as reasons for seeking an account, and were, I think, established by her own evidence. A loan of money of the estate was made upon the security of a house and three lots in the city of Keyser, in the state of Kentucky, and loans were made upon personal security only. It is true the amounts of these loans were not large, and perhaps did not exceed the amount to which the administratrix was entitled as her share of the estate. But they were not considered by her as loans of her own money. Her sureties did not so consider them, and in order to quiet

1881. their apprehensions on account of these loans she gave them property of the estate in security.

Killins
v.
Killins.

I prefer, however, to place the right of the plaintiff to costs to the hearing on the former ground, that no proper accounts were kept.

Judgment.

These improper investments have not resulted in any loss to the estate, and all that has come to the hands of the administratrix has been accounted for, and of the money in court she seems to be entitled to about \$600. I therefore think she must have her costs subsequent to decree, out of the estate. In the face of these irregularities it would obviously be improper to make the plaintiff pay them.

The Registrar can ascertain how the money in Court is to be appropriated from the Master's report and this judgment.

The plaintiff's costs, subsequent to decree, will also come out of the estate.

1881.

BURROWS V. LEAVENS.

Conveyance by illiterate person—Misrepresentations to party executing a deed—Husband and wife.

A married woman, who could neither read nor write, and was possessed of real estate, was asked to join in a conveyance by way of mortgage in order to bar her dower in her husband's land. The mortgagee's solicitor knew that she had objected to mortgage her land, and it was not explained to her or her husband that, by her joining, her estate would be liable in any way. In fact the husband and wife were made joint grantors, and jointly covenanted for payment. After the death of the husband proceedings were instituted against his widow to compel payment by the assignee of the security. The Court [BOYD, C.] under the circumstances, declared the instrument invalid as against the separate estate of the widow, and dismissed the bill with costs.

This was a suit by the assignee of a mortgagee to enforce his security against the defendant the widow of the deceased mortgagor, under the circumstances stated in the judgment.

The cause came on for examination of witnesses and hearing at the autumn sittings of 1881 at Belleville.

Mr. *Moss*, and Mr. *Clute*.

Mr. *McCarthy*, Q.C., for the plaintiff.

Mr. *S. H. Blake*, Q.C., and Mr. *Bleeker*, for the defendant.

BOYD, C.—The loan to the deceased mortgagor was October 26. negotiated by the solicitor of the mortgagee, who also intervened in the assignment of the mortgage to the present plaintiff. The knowledge and dealings of this solicitor in the transaction are to be imputed to the original mortgagor and his assignee. I found as facts, at the conclusion of the case, that no explanation was given to the married woman as to the effect of her covenant to pay the money advanced, and also that she believed the instrument to be one affecting only her dower in

1881. the property mortgaged, and in that belief executed it by affixing her mark thereto. The solicitor was aware, when the husband applied for the loan, that his wife had land which she objected to mortgage on his behalf; it was then arranged that the money would be advanced if she joined in the mortgage. She was made a co-mortgagor, and the covenant was that the mortgagors should pay the money. No explanation was given to the husband that the wife's estate would be liable if she joined. The husband is dead, but he is spoken of as possessed of less intelligence than a German witness named *Gethardt* who was examined. *Gethardt* was a friend of the family, and was told by the solicitor to go to the wife, and explain the document she was to sign. What explanation he made is not disclosed, but it is plain from his demeanor and evidence that he could not explain what he himself did not understand. The only explanation attempted was at the time of execution, when Mr. *Reid*, a man of

Judgment. intelligence, stated that he read over the mortgage and assured the married woman that it did not affect her property, and that all she was doing by signing it was to bar her dower in her husband's favour. He swears positively that he did not then understand that she was entering into any personal engagement, and the wife swears the same, with the addition that if she had supposed it affected her land she would not have signed it. The next step in the transaction was, to return the mortgage to the mortgagee's solicitor, who, when he observed that the *testatum* clause did not contain the usual words certifying that the instrument had been read over and explained to the marks-woman, delayed to act upon it till the omission was supplied. He then inserted these words and sent it back by the hands of his own agent, *Marshall*, who was to see that it was properly explained to her. This however *Marshall* did not do, relying apparently on Mr. *Reid's* word that it had been explained to her, and no further

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communication was had with the defendant. It was proved that she could neither read nor write; and as we have seen the alleged explanation was a misleading one in that it did not call her attention to the nature and effect of her covenant to pay; but with this explanation the solicitor rests satisfied.

It is said in the Touchstone in regard to the reading of deeds to an illiterate man, if the party himself to whom the deed is made or a stranger shall read the deed or declare the contents thereof falsely and otherwise than in truth it is the deed will be void, at least for so much as is so misread or misdeclared; p. 56. So in *Thoroughgood's Case (a)*, one of the resolutions is to the effect that although the party to whom the writing is made or other by his procurement doth not read the writing but a stranger of his own head read it in other words than in truth it is, yet it shall not bind the party who delivereth it, and the result is the same if instead of reading the effect thereof is declared in other manner than is contained in the writing. The Master of the Rolls, in *Hoghton v. Hoghton (b)*, points out that where an explanation of the contents of a deed is required, the reading over to an unprofessional person is more likely to confuse than to enlighten him. Those words are with peculiar emphasis applicable to the circumstances of this case, where the dealing was with an illiterate married woman respecting her estate, which she was by implication to imperil for the advantage of her husband.

The case does not precisely fall within that line of authorities referred to in *May*, (at p. 453,) where a person getting security from one to whom his debtor stands in a confidential relation of which he has notice, must prove that the transaction was fully understood by the person giving the security: because here there was a contemporaneous advance, and the position of

1881.

Burrows
v.
Leavens.

Judgment.

(a) 2 Rep. 9.

(b) 15 Beav. 311.

1881. husband and wife, in so far as her separate estate is voluntarily applied for his benefit, is not now perhaps one in which undue control will be imputed so as to cast on the husband the onus of establishing the validity of the gift. But in all transactions like the present, the Court will scrutinize with some jealousy what is done, so as to be satisfied that no imposition has been practised on the wife through the medium of her husband with the connivance or at the instance of the creditor or lender: *Corbett v. Brock* (a), *Mulholland v. Morley* (b), *Northwood v. Keating* (c), *Nedby v. Nedby* (d), *Flower v. Buller* (e). Before the transaction was closed the mortgagee had notice that the wife was an illiterate person, who must depend on others for an explanation of the documents signed by her; that no proper explanation had been given her or her husband, of the effect of the covenant to pay the mortgage money, and that she had already resolved not to sign any mortgage on her own land for the benefit of her husband. These things should have attracted attention, and caused him to satisfy himself that the woman fully understood what she was doing and intended to sign the engagement binding on her estate to make good the proposed advance to her husband, *Flower v. Buller* (f), *Davies v. London Co.* (g).

Judgment.

As I have stated, the evidence clearly establishes the misconception that existed in the minds of all who advised the wife as well as in her own mind, and the misleading character of the explanations given to her at the time of the execution of the mortgage. This being so can it be held that her intention was to bind her separate estate by the signing of this covenant? *Prim facie* the engagement manifested by the covenant would render liable her separate estate. But

(a) 29 Beav. 524.

(c) 18 Gr. 666.

(e) L. R. 15 Ch. D. 665.

(g) L. R. 8 Ch. D. 469.

(b) 17 Gr. 298.

(d) 5 DeG. & Sm. 377.

(f) L. R. 15 Ch. D. 665.

this is not an inevitable conclusion if the circumstances satisfy the mind that she had no such intention. Adapting to the circumstances of this case the language of *James, L. J.*, in *Johnson v. Gallagher (a)*: "The Court is bound to impute to her the intention to deal with her separate estate unless the contrary is clearly proved." This clear proof we find in the present case so that I am satisfied she never intended to deal with reference thereto in signing the mortgage in question. Some hardship may result to the lender from this conclusion, yet I regard him as having acted with such negligence as to preclude him from saying that he has been misled by the form of the security which he procured her to sign.

1881.
 Burrows
 v.
 Leavens.

It was not contended that the assignee of the covenant was in any better plight than the first taker, nor could it have been argued with any success: *Cockell v. Taylor (b)*.

Judgment.

My conclusion is, that the covenant is invalid as against the separate estate of the defendant, and should be so declared. The bill is dismissed with costs, except so much of the costs as have been occasioned by the transfer of the property to the son. I do not give the costs at law to either party. Any amendments required to square the pleadings with the evidence should be permitted if desired.

(a) 3 DeG. F. & J. 494.

(c) 15 Beav. 103.

1881.

LEE V. CREDIT VALLEY RAILWAY COMPANY.

Creditors' suits—Receiver discharged—Creditors' rights.

A receiver was appointed under the decree in this suit to collect revenue, and, after paying expenses, to pay the balances into Court, which were to be paid out on the report of the Master to the parties entitled as found by him. *S.*, pursuant to advertisement for creditors, proved his claim. The Master had not made his report. By 44 Vict. ch. 61 (O.), the defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of *C.* and *F.*, who were appointed creditors' trustees, in payment of all money necessary to be paid for the discharge of the receiver in this suit. An order of Court was made, on the application of the defendants, discharging the receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came under it should take fifty cents on the dollar.

Held, that the position of affairs having altered since the time at which *S.* had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible.

Motion by defendants to restrain a creditor from proceeding to recover the amount of claim, after having proved the same under the decree.

The facts appear in the judgment.

Mr. *S. H. Blake*, Q. C., and Mr. *Blackstock*, for the defendants.

Mr. *E. Meyers*, contra.

December 7. PROUDFOOT, J.—Under ordinary circumstances I would have had no difficulty in holding that the creditor, *Smith*, having proved his claim under the decree in this cause, should not be allowed to prosecute an action for the same debt in another Court, or in another action.

But the circumstances here are not ordinary.

The decree ordered a receiver to be appointed of the

revenues, issues, and profits of the railway, and, after deducting expenses of management, to pay the balances, from time to time remaining, into Court; and directed the Master to inquire and state the debts and liabilities of the company, and the rights and priorities of the persons interested in the money to come into the hands of the receiver, and the moneys when so paid into Court are to be paid to the parties whom the Master shall find entitled thereto, according to their priorities to be ascertained by the Master.

1881.
 Lee
 v.
 Credit Valley
 R. W. Co.

In pursuance of this decree the Master advertised for creditors, and among others *Smith* came in and proved his debt.

The Master, I am told has not yet made his report. I am not informed if there is any money in Court paid in by the receiver to answer the claims of those who have proved.

So far the matter is plain enough, and had it rested there the course of the creditor would have been simple enough; he could have obtained the conduct of the cause, if the plaintiff were needlessly delaying it, obtained the Master's report, and been paid out of money collected or to be collected by the receiver.

Judgment.

But I have been greatly perplexed by the statute amending the Acts of the company, and by the order purporting to be made thereunder, discharging the receiver. The statute (44 Vict. ch. 61, O.) authorized the company (S. 10) to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of *Kenneth Chisholm* and *Valancey E. Fuller*, who were appointed creditors' trustees: First, in payment of the remuneration of the trustees, and "secondly, in payment of all moneys necessary to be paid for the discharge of the receiver appointed by the Court of Chancery, in the suit therein of *Lee* against the said company."

The discharge of the receiver here must mean the final discharge, when all the purposes of the decree had

1881. been attained. It could not mean the discharge of the receiver in passing his accounts, for any money for that purpose must have been paid by the receiver himself. Nor could it mean the discharge of the then receiver leaving another to be appointed in his place. It must, therefore, have meant, and could only have meant, such a discharge as this Court would have given, when through the operation of a receiver all the claims proved under the decree, and which creditors were invited to send in, had been satisfied out of the revenues of the company.

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Judgment.

But I find that an order has been made by my brother *Ferguson* discharging the receiver, without providing for the payment of claimants who proved under the decree. This order seems to have been made upon the application of counsel for the defendants and the receiver, in the presence of counsel for the plaintiffs, and of counsel appointed by the Master to represent the creditors of the defendants, and also representing the trustees appointed by the statute. The receiver was discharged, his sureties released, and the management of the company relegated to them, so far as it was interfered with by the appointment of the receiver.

When it is said the creditor is bound by having proved in this suit, it is essential to know that the suit is in the same position it was in when he proved his claim, and that the defendants have done nothing to interfere with the remedies he might have had under it.

When the creditor proved his claim there was a receiver of the railway for the benefit of creditors who might prove in that suit, and whose duty it was to gather in the revenues till enough was collected to pay off the proving creditors. The defendants themselves have altered this state of affairs, for it was on their application that the receiver was discharged. Then it is very doubtful whether a new receiver can be appointed in this suit, the statute having provided for

his obtaining his discharge from the Court, which he has obtained, and I apprehend that the creditor can get no benefit under the statute, unless he choose to accept fifty cents in the dollar. For after providing for payment of money necessary to obtain the discharge of the receiver, which I think means to include enough to pay all who proved in the suit, it goes on to provide that all other creditors who elect to come in under the Act are to receive only fifty cents in the dollar, and as the receiver has been discharged, without this creditor being paid, he could only come in under the statute for 50 per cent. of his claim.

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The staying of proceedings by injunction is an application to the discretion of the Court, and it will not be granted unless the remedy is equally efficacious in this Court under the decree, as in the Court where action brought. In this instance I do not think it by any means clear that the creditor can now in this suit get more than 50 per cent. of his claim, and I ought not to restrain him from endeavouring to get the whole if he can. This Court in staying proceedings in other Courts supposes the other Court to have jurisdiction, but does not think proper, from mere collateral circumstances, to suffer the party to apply and take the benefit of that jurisdiction, (Drew. 96). Whether these circumstances are sufficient for this purpose must always depend on the facts of each case.

Judgment.

In this case I do not think them sufficient, and refuse the motion, with costs.

1881.

WALMSLEY V. RENT GUARANTEE COMPANY.

Corporation—Ultra vires—Discounting notes.

A company receiving money on deposit, which is placed to its credit at a bank, is liable for the money so received, though the taking of money by deposit be *ultra vires*; and if the officers of the company use such moneys in other *ultra vires* transactions, that may be a proper matter for the shareholders to charge those officers with, but it is not one with which the depositor has anything to do.

One *E.* advanced \$4,000 to *I. & M.*, on the guaranty of the defendant company, clearly acting *ultra vires*, who obtained, as security for such guaranty an order from *I. & M.*, on the water works company, for the amount. *I. & M.* afterwards induced the defendants to give up the order on replacing it by orders for half the amount. *E.* recovered judgment by default against the defendants, and by *sci. fa.* realized the amount of his loan.

Held, affirming the Master's report, that *B.*, who was one of the directors of the defendant company, and who had been instrumental in procuring the above guaranty, was properly charged with the amount the defendants had lost through the delivery up of the order on the water works company; but that he was not liable for the balance of the claim of *E.*, since it had been made up to the defendants by the moneys realized on the orders by which the order so delivered up had been replaced.

An incorporated company, by its charter, was authorized to carry on business in the management of real and personal property; guarantee rents thereof; to collect rents, &c.; procure loans, and to negotiate the sale and purchase of houses, mortgages, stocks, and other securities, "and generally to transact every description of commission and agency business, except the business of banking, and the issue of paper money or insurance."

Held, that this did not confer any power upon the company to discount notes guaranteed by their indorsement; neither had they the right to speculate in the purchase of mortgages or other securities, although they might have been justified in investing any surplus capital or accumulation of profits until the same was required.

Appeal from the Master's report under the circumstances stated in the judgment.

Mr. *W. A. Foster*, for the plaintiff.

Mr. *Spencer*, and Mr. *W. Cassels*, for the Company.

Mr. *Maclennan*, Q. C., Mr. *Moss*, Mr. *Bain*, for other parties. 1881.

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PROUDFOOT, V. C.—The Master by his report has found that the Company are liable to repay to Dr. Wright a sum of \$2,500, deposited by him with the Company. Feb. 10.

The Company appeal from this finding, on the ground that receiving money on deposit was *ultra vires* of the Company.

There is no doubt in my mind that the receiving money on deposit was not within the charter of the Company, and was therefore *ultra vires*.

It appears, however, that the money was received by the Company, and that it was deposited in the Bank at which the Company kept their account to their credit. For the purpose of the present appeal I do not think it necessary to investigate it further. If, as alleged, the officers of the Company employed the money in other *ultra vires* transactions, that may be a proper matter with which to charge these officers, but it is not one with which the depositor has anything to do. I find among the papers left with me a statement by the Master, shewing that of this \$2,500, there were \$2,080, employed by the officers of the Company for the purposes of the Company, and in discounting notes on which, though *ultra vires*, there was no loss. If that statement be accurate the question would only affect some \$420. But in my view, it is not material whether it were correctly employed or not. The liability for the deposit appeared in the account presented at a meeting of shareholders, in July, 1876, at which a majority of shareholders was present, and was approved by them. This would not of itself, bind absent shareholders or the Company for an *ultra vires* transaction,—but coupled with other facts would lead strongly to the conviction that the shareholders all were aware of the Company seeking for deposits. Judgment.

1881. Thus, it appears that it was painted on the window of the Company's offices that they were prepared to receive deposits on interest, and they had pass books prepared to give to depositors, one of which was given to Dr. Wright. But without pursuing that subject further, I think the principles involved in the decisions of The German Mining Company's case (a), and in *Ernest v. Croysdill* (b), cover the facts before me, and shew that the conclusion of the Masters should not be disturbed.

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Another ground of appeal by the Company is, because the Master has not charged *Barret*, one of the Directors, with \$4,000, the value of a security held by the Company, and given up by him or by his authority, and has only charged him with \$2000, there having been taken back securities for \$2000, when the larger one was given up.

Judgment. The transaction took place in this way,—*Irwin & Marshall*, contractors for the Water Works in Toronto, were desirous of obtaining a loan of \$4000, and applied to the Company, to get it for them. The Company found that one *English* would lend them the money, but required the Company to guarantee the payment. The Company agreed to do so on getting the security of an order on the Water Works Company for the amount, and having got the security, guaranteed the loan. *Irwin & Marshall* afterwards applied to the manager of the Company, *Badenach*, to have the security given up to them on replacing it with half the amount. This was done, though the evidence is not satisfactory to shew whether *Barrett* authorized the giving of it up. But upon the ground of its being originally an *ultra vires* transaction, entered into through the instrumentality of *Barrett*, the Master has made him responsible for the loss, \$2131.83.

It seems that the \$2,000, received from the Water

(a) 4 D. M. & G. 19.

(b) 3 D. F. & J., 175.

Works Company on this transaction, were not applied specifically to the reduction of the *Irwin & Marshall* debt, but a part at least was employed to retire a note for \$1,750, indorsed by *Barrett*, and discounted for the purposes of the Company. 1881.

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English recovered judgment at law, and by means of a *sci. fa.*, realised the amount from *Barrett*, *Howard*, *Copp* and *Walmsley*, shareholders of the Company, and the Master makes *Barrett* liable to indemnify the Company and the other shareholders.

So far as this appeal of the Company is concerned, the finding of the Master seems to me correct. The \$2,000 received from the Water Works Company, were employed for the benefit of the guarantee Company; it was indeed in the shape of taking up a note indorsed by *Barrett*, but the proceeds of that note went into the Bank account of the Company, and were employed for its uses. And upon the principle upon which the first appeal was disposed of, this also ought to be dismissed.

Judgment.

Barrett has also appealed from the finding of the Master, charging him and the other directors with \$1,723,70 losses, incurred in discounting notes, and also charging him with the \$2,131.83, on the *Irwin & Marshall* transaction above mentioned; he contending that the whole body of shareholders are responsible for these.

It was contended that discounting notes was within the powers of the Company, and even if not, that the act must be so clearly beyond their authority that doing it would amount to a fraud.

By the charter of the company, the capital stock was placed at \$20,000 in 400 shares of \$50 each, and the objects of the company were, "for the purpose of carrying on in the said cities of Montreal and Toronto, respectively, the business of agents in the management of estates and other real and personal property; to lease household and other premises, and to guarantee

1881. the due payment of the rents thereof; to collect rents and all other claims or accounts; to procure loans, advances, and investments; to negotiate the purchase and sale of houses, farms, lands, leases, mortgages, stocks, and other securities; and generally to transact every description of commission and agency business, except the business of banking, and the issue of paper money or insurance.”

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I have not been able to read this charter as conferring any power to discount notes, guaranteed by their indorsement. Laying aside the question, whether such transactions are not in the nature of a banking business, and therefore offend against the prohibition to do such business contained in the charter, it does not seem to me that any of the powers granted sanction business of that kind. The objects of the Company were to transact an agency business, to procure loans, not to make them or to guarantee them; to collect rents and accounts, and to do a commission and agency business. The capital required for such purposes could not be very great, and the \$20,000, stock must have been ample to provide for any contingencies that could legitimately arise. There is no indication of any intention to give power to borrow for the purposes of the company, and I am unable to see that it ought to be implied. The company was not authorized “to purchase mortgages, stocks, and other securities,” but only to “negotiate” for the purchase,—*i. e.*, to act as agents in making the purchase. It is quite possible that, if the company had called up more capital than was needed for their business, or had on hand a large sum derived from the profits of the business, an investment of it till required would have been proper and justifiable; but that is entirely a different case from borrowing money to make loans, which is practically the business they engaged in. The cases to which I was

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referred, collected in *Brice on Ultra Vires (a)*, do not carry the implication of power or authority further than this, that if the possession of money is essential for the purpose of carrying on the business, if the company finds itself in temporary difficulties for want of money the directors may obtain loans, if they can, to prevent the disaster of the stoppage of the Company. Or as it is put with still wider latitude of expression, (*Brice*, 263), that commercial corporations may in all cases of need, if not in the ordinary course of their business, borrow, if not positively forbidden. Or having property that it is authorized to deal with, the Company can mortgage, unless prohibited expressly from doing so. But all these cases assume that the business requiring aid is the legitimate business of the Company. None of them go the length of saying that money may be borrowed to enable the directors to embark in a business not authorized by the charter. And as I cannot find in this charter any power to lend money as an object of the Company, I cannot imply any power to borrow for that purpose. Judgment.

But, it is argued, even if there be no power in the charter, a great deal more is necessary before you can make directors personally responsible; you must shew a want of good faith,—that if they are only guilty of mistake or error of judgment, they are not responsible; that the act must be clearly *ultra vires* to make them liable, and if it is not, they are only liable for not taking proper care and advice.

The acts here said to be *ultra vires* are lending money without authority, and becoming security for loans. Both these, I think, are so clearly beyond the proper purposes of this Company, that ignorance of the extent of their powers cannot be allowed to protect the directors. There were only twelve shareholders in the Company, among whom the stock was

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(a) pp. 263, 264, 271, and 276.

1881. divided, and of these, five at least seem to have been gentlemen of the legal profession, and the present appellant has for many years practised as a barrister. The terms of the charter appear to me so plain, that I cannot exonerate the appellant at the expense of his intelligence.

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HILLOCK V. BUTTON.

Marriage settlement—Improvvidence—Power of revocation.

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside.

The plaintiff, who had just come of age, being about to marry, applied to her solicitor who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage.

Held, that it was not a voluntary settlement, and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake.

This was a suit instituted by a married woman seeking to have a settlement of her property made on her marriage cancelled, and the property delivered up to her; and came on to be heard upon evidence taken before the Court; the effect of which is stated in the judgment.

Mr. S. Blake, Q.C., and *McGillivray*, for the plaintiff.

Mr. Plumb, for the infant defendant.

Mr. Farewell, for the husband and the trustees of the settlement, submitted to recovery of the Court considered it could be done.

PROUDFOOT, V.C.—Mrs. *Hillock*, the plaintiff, then Miss *Wells*, came of age on 23rd September, 1875, and was married on 10th November, 1875. She was entitled to a share in her father's estate as one of his heirs-at-law, he having died intestate, and Mr. *Farewell*, a solicitor, had been her guardian by appointment of the Surrogate Judge.

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Some time, how long does not appear, before her marriage, Mr. *Farewell* suggested to Miss *Wells*' sister the propriety of having Miss *Wells*' property settled on her approaching marriage. And three days before the marriage Miss *Wells* and her sister called at Mr. *Farewell*'s office and gave instructions for preparation of the settlement. At this interview Mr. *Farewell* seems to have explained the usual objects of such a settlement. He spoke of provisions for the children, should there be any, and how the money was to go in that case, that it should go to the child, and that it was advisable to protect the child's interest from the husband. It was also discussed what was to be done in case Miss *Wells* died first, and what if Mr. *Hillock* did. He got instructions on these and other points from the plaintiff. The plaintiff understood she was to have the power of making a will. No mention was made of a power of revocation, or of a right to destroy the trusts of the settlement. The plaintiff says she never thought about it. Her sister says that nothing was said about this. The intention was, to protect plaintiff from her husband. Heads of a settlement embracing these matters were read over to, and approved by, the plaintiff. On the morning of the marriage Mr. *Farewell* read over the settlement to the plaintiff and Mr. *Hillock* and it was executed by them and by the trustees before the marriage.

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The settlement provides that during the coverture of the plaintiff the trustees were to pay the rents, interest, &c., to the plaintiff. In case of the death of the plaintiff during the life of her husband, the

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trustees were to pay to such person as she should by her last will order and appoint, and in default of such appointment then to hold and be possessed of the moneys (settled) for the heirs of the body of the plaintiff. And in the event of the death of the plaintiff intestate and without issue surviving her then to pay to the husband the interest, &c., during his life and so long as he should remain unmarried, and from and after his marriage after plaintiff's death, then to pay to the next of kin of the plaintiff and her husband in equal parts, the husband to take one part as if one of the next of kin of the plaintiff and had never been her husband; and in the event of the husband not marrying again and dying, then upon trust for the next of kin of the plaintiff. In the event of the plaintiff surviving her husband the moneys were to be paid to her, and the lands conveyed to her and the settlement was to be at an end.

There is one child, issue of the marriage.

Judgment.

The settlement seems to be unobjectionable unless it ought to have contained a power of revocation.

The plaintiff seeks to have it declared that she is entitled to have the trust moneys handed over to her, and to have the settlement vacated, upon the ground of improvidence and mistake, and the absence of a power of revocation.

There is no improvidence in the transaction, in fact the settlement gives larger power to the plaintiff than are often found in such instruments. It is a settlement for value, and must be governed by the rules applicable to such a case.

After the deliberate judgment of the Court in *Re White, Kerstane v. Tune (a)*, in which most of the cases cited in the argument before me were examined, I must hold that the absence of a power of revocation is not of itself a reason for setting aside even a volun-

(a) 21 Gr. 547 ; affirmed 24 Gr. 224.

tary settlement. There must be some other element as fraud, improvidence, or mistake. In this instance, fraud is out of the question; and so is improvidence, since the trusts of the settlement are proper provisions in case of a contemplated marriage.

No doubt the plaintiff had just come of age, and if the trusts had been unusual, had she been deprived of powers that are commonly left in the hands of settlors, that might have been a strong reason for supposing she had not done what a prudent person would have done. Again, it was said she should have had independent advice. But Mr. *Farewell* was her solicitor; he was protecting her in the transaction; he did not know the intended husband. The settlement was prepared after consultation with her, and after explaining to her the objects desired to be attained by the deed. If the settlement had been a voluntary one, and he had not represented to her the propriety of retaining a power to revoke, the deed might have been liable to the objection of improvidence, though not necessarily so. But the power of revocation is not a usual one in settlements for value: *Peachy*, 884.

There remains then only the question of mistake. The plaintiff says she did not understand she was not to have the power of withdrawing the property from the settlement. It was not discussed. But some months afterwards she applied to the trustees for a portion of the money as if she had a right to it, which is said to be evidence she mistook her powers under the settlement. The evidence of all the witnesses is uniform that this matter was not the subject of discussion prior to the execution of the settlement. It was entirely overlooked—never thought of—and the rule of the Court is, that in such a case it will not interfere: *Parker v. Taswell* (a). That was a bill for specific performance by lessee against landlord, which

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(a) 2 DeG. & J. 559.

1881. was resisted on the ground that by mistake the agent had failed to provide for payment by the tenant of the tithe rent charge, which under a previous lease the same tenant had always paid. The Chancellor says :
 “ It seems to me not a case of mistake at all, but a case in which the agent of the landlord had overlooked the subject of the tithe rent charge, and in which nothing was specially agreed upon between the parties on the subject * * Here is a substantive agreement, which speaks in sufficiently clear terms for itself, and contains no reference to any other instrument, or to any pre-existing relation, and I am called upon to suppose that a term of importance was intended to be inserted in the agreement ; and that, if the agreement is to be specifically performed, I must insert in the lease a covenant for payment of the rent charge.” And in *Barrow v. Barrow (a)*, which was a bill to rectify a settlement, the Master of the Rolls says : “ The result of the evidence appears to me to be, that Mr. and Mrs. *Barrow* believed, that, by the settlement made on her first marriage, the £10,000, was so settled that Mrs. *Barrow* had the exclusive power over it, and that they agreed that the rest of her property should be settled in like manner, which was accordingly done. * * * The utmost that can be said in favour of Mrs. *Barrow's* case on this point, as the result of the evidence, appears to me to be this : that if the real effect of the first settlement, as to the £10,000 had been present to the minds of both parties, they would have agreed that it should have been included in the second settlement. If I am correct in this view of the evidence, I think the conclusion is, that this Court cannot interfere to rectify the settlement. The jurisdiction of the Court, in matters of mistake, is to be very cautiously exercised ; the extent to which it can be carried, in such a case as this, is, to correct an error in carrying into effect

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the real contract between the parties. I am not aware of any case, and none has been produced to me, where, in the absence of fraud, such as the suppression of a fact that ought to have been communicated, this Court has interfered to make a settlement conformable with what would have been the contract between the parties, if all the facts material to be known by them, had been then present to their minds."

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The subsequent act of the plaintiff in asking for money, is of very little importance in determining what she thought at the time of the settlement. Her belief, it seems, however erroneous as to her powers, could not be allowed to control her deliberate deed. But it is impossible to say whether this demand was the result of her belief at the time of the settlement, or of something that occurred subsequently. At all events, it is not sufficient to justify the cancellation of the deed.

Judgment.

The plaintiff had also, in April last, executed a will devising the property to her husband. But till her death her last will cannot be known. It may be she will not die testate. She may not predecease her husband, and in that case the will would be of no avail.

I think the bill must be dismissed, with costs. The trustees may pay this sum and the infant's costs out of the interest, &c., payable to the plaintiff.

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SCOTT V. DUNCAN.

Will, construction of—Estate tail—Vested interest.

The testator directed all his lands to be sold by public auction or private sale on his youngest surviving child attaining 21, and the proceeds to be divided amongst nine of his children, share and share alike; but in the event of either of the nine children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors.

Held, that these words did not create an estate tail or *quasi* entail—and that the shares of the legatees were vested.

This was a bill to obtain the construction of the will of James Gage, deceased.

The testator directed all his lands to be sold by public auction or private sale on his youngest surviving child attaining twenty-one, and the proceeds thereof to be divided amongst nine of his children, share and share alike; but in the event of either of the nine children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors.

Annie Gage, one of the nine legatees, had married the defendant *Duncan* and died, leaving the infant defendants, having bequeathed her property to her husband.

It was sought to have it declared that the legatees each took an estate tail in their shares of the property.

Mr. *Hoskin*, Q. C., and Mr. *Creelman*, for the plaintiffs, the executors.

Mr. *A. D. Cameron*, for the defendant, *Duncan*.

Mr. *Ewart*, for the children *Duncan*.

Judgment.

The following cases were referred to: *Leeming v. Sherratt* (a); *Cooper v. Cooper* (b); *Re Chisholm* (c); *Gray v. Richford* (d).

(a) 2 Ha. 146.

(b) 29 Beav. 229.

(c) Ante Vol. 17, 403; Vol. 18, 467. (d) 2 S. C. 431.

PROUDFOOT, V. C. — I think the dying without issue before the youngest child shall attain the age of twenty-one years, in this will did not create an estate tail, or *quasi* entail, as contended for on behalf of the infants; and as the subject was personalty, it would not have benefited them; for the effect of that construction would be to give the mother the absolute interest, which would pass by her will.

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It was not contended that the shares of the legatees were not vested.

The will will be construed as above.

TOWNSHIP OF THURLOW V. TOWNSHIP OF SIDNEY.

Municipal corporations—Arbitration—Time for making award.

Seemle, that the combined effects of secs. 377 and 380 of the Municipal Act, is to enable the arbitrators in cases coming within these sections to extend the time for making their award beyond the month.

The plaintiff municipality sued upon an award whereby the defendant municipality was ordered to pay their proportion of the cost of a drain constructed by the plaintiffs. It was shewn that the arbitrators met frequently and adjourned from time to time, counsel for the defendants appearing before the arbitrators and raising no objection to such adjournments, or that the month from the date of the appointment of the third arbitrator, as prescribed by sec. 377 of the Municipal Act, had elapsed without any award having been made.

Held, that an award made after the expiry of the month was valid.

This was an action instituted in the Court of Queen's Bench, and came on to be tried before *Proudford*, V. C., at the sittings of the Court of Chancery, held at Belleville, in the spring of 1881.

The facts appear in the judgment.

Mr. *Blake*, Q. C., and Mr. *Holden*, for the plaintiffs.

Mr. *Wallbridge*, Q. C., for the defendants.

1881. PROUDFOOT, V. C.—The plaintiffs sue upon an award
 made on the 30th day of May, 1878, by two of three
 arbitrators, under the Municipal Act, by which the
 defendants were ordered to pay to the plaintiffs \$300
 for the benefits they derive from the construction of a
 drain made by the plaintiffs. The third arbitrator was
 appointed on the 21st February, 1878, and the declara-
 tion alleges that the time for making the award was
 duly enlarged till the award was made.

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The defendants plead that the arbitrators did not enlarge the time as alleged, and that the two arbitrators did not make any such award as alleged.

Under the plea of no award it may be shewn that the award was not made in due time: *Russell* on Awards, 5th ed., p. 533.

The 377th section of the Municipal Act, R. S. O. ch. 174, enacts that in such cases the arbitrators shall make their award within one month after the appointment of the third arbitrator; and by the Interpretation Act (sec. 8, subsec. 2), the word "shall" is to be construed as imperative, except (subsec. 7) in so far as the provision is inconsistent with the intent and object of the Act, or inconsistent with the context. By the 380th section of the Municipal Act, the arbitrators shall, within twenty days after the appointment of the third arbitrator, meet to hear and determine the matter in dispute, *with power to adjourn from time to time*.

Judgment.

The evidence established that adjournments had been, in fact, made down to the time of making the award; but it was contended that the arbitrators had no power to enlarge the time beyond the month specified in the 377th section. If it were necessary to determine the combined effect of the 377th and 380th sections, I would be inclined to hold that the power of enlargement empowered the arbitrators to extend the time for making their award beyond the month; that the Act should be read as enacting that the award should be made within a month unless the time for making it were extended.

But it is not necessary in this case to decide the point, because counsel for the defence appeared before the arbitrators at meetings in May, long after the expiration of the month, and made no objection on that ground, and the defendants are therefore precluded from saying that the authority of the arbitrators was at an end.

1881.

Township of Thurlow v. Township of Sidney.

There seems no reason for attributing a more rigid construction as to the time for making the award under our Municipal Act than to the similar provisions in the Lands Clauses Acts in England. The Imp. Stat 8 & 9 Vict. ch. 19, sec. 35, enacted that if, when the matter shall have been referred to arbitration, the arbitrators should for three months fail to make their award, the question of compensation shall be settled by the verdict of a jury. In the *Caledonian R. W. Co. v. Lockhart (a)*, all the Law Lords were unanimous in the opinion that this did not prevent the parties from enlarging the time for making the award, and I take the reasons for this from the judgment of Lord *Wensleydale (b)*: "The first objection was stated in the form of a dilemma, that it was either a statutory arbitration or one at Common Law. If statutory, it was said that it expired at the end of three months, according to the Lands Clauses Consolidation Act of Scotland, 1845, and could not be extended beyond that period by consent.

Judgment.

* * I am clearly of opinion that this objection is unfounded. The 35th section is, I think, introduced for the benefit of both parties, that the settlement of the question of compensation might not lie over indefinitely, which it would do if the parties had not stipulated that the award should be made in a certain time. It would have depended on the mere will of the arbitrator when he should choose to make his award, and the power of appeal to a jury would be entirely taken away. I think that the principle '*Quilibet potest renunciare juri*

(a) 3 McQueen, 808.

(b) p. 822.

1881. *pro se introducto*' applies, and that it was competent for both parties to agree to enlarge the time. Further, there is no doubt that they did so, by the enlargement to a day in blank * * and also by their subsequent conduct."

A decision to the same effect on the English Lands Clauses Act is found in *Palmer v. The Metropolitan R. W. Co.* (a).

And that parties cannot object to an award after allowing the arbitrators to proceed after the prescribed time without objecting to their doing so: see *Hawksworth v. Bramwell* (b).

I shall therefore enter a verdict for the plaintiffs for \$300, with interest from the date of the award.

Mr. *Bell's* evidence confirms the opinion I had formed without it, that the award sued on is the true award (c).

MCARTHUR V. PRITTIE.

Appeal from Master—Taking further evidence at sittings.

On an appeal from the Master on a question of the weight of evidence, the Court, though not satisfied as to what was the actual truth of the case, could not say that the Master was wrong, and therefore dismissed the appeal, with costs; liberty being given to the appellant, however, to examine the witnesses again at the next sittings before the learned Judge who heard the appeal, so as to enable him to dispose of the matter with greater satisfaction to himself, in which case costs would be reserved.

Appeal by the plaintiff from the Master, at Brockville, in a mortgage case, under the circumstances stated in the judgment.

Mr. *Hodgins*, Q.C., for the appeal.

Mr. *Boyd*, Q.C., contra.

(a) 31 L. J. Q. B. 259.

(b) 5 M. & C. 281.

(c) See, S. C. 1 O. R. 249.

BLAKE, V.C.—If the plaintiff is to be believed the mortgage in question was given to satisfy the old debt. If the defendant is to be believed it was given to satisfy the fresh advances, and if, after they were satisfied, there was any sum still to the good, it was to be applied on the old debt. The Master has taken the account in this latter way. He has believed the story of the defendant rather than that of the plaintiff, and I cannot say, after perusing the evidence several times, that he was wrong in doing so. At the time the mortgage was given there was an old debt of nearly \$800, and the fresh debt of nearly the same amount; so that the acknowledgment of indebtedness in the mortgage might be attributed to either of these sums. The Master having seen the witnesses, and examined the matter fully, has chosen to accept the statement that the only moneys to be applied on the old debt were the profits to be made out of the wood and tie contracts. The details of the accounts were not presented to me, nor was it argued they were incorrect. This one question of fact was alone raised, on which I cannot differ from the Master. If there had not been the fresh debt, to which the mortgage has been attributed, with the exception to which I refer, I should have concluded that the mortgage covered the old debt: *Bird v. Gammon* (a), *Lechmere v. Fletcher* (b), *Cheslyn v. Dolby* (c), *Nash v. Hodgson* (d).

I must dismiss the appeal, with costs. At the same time, if the appellant chooses to examine the parties before me at the next Brockville Sittings, I do not object to take the evidence. It will enable me to dispose of the matter much more satisfactorily to myself. In that case the costs will be reserved.

1881.
 McArthur
 v.
 Prittie.
 Feb. 24.

Judgment.

(a) 3 Bing. N. C. 883.

(b) 1 C. & Mee. 623.

(c) 2 Y. & C. Ex. 170, 4 Y. & C. 238.

(d) 6 DeG. M. & G. 473.

1881.

SMITH V. HARRINGTON

Insolvent Act of 1875, sec. 130—Contract by person in insolvent circumstances—Mortgage.

A mortgage is a "contract" within the meaning of the Insolvent Act of 1875, section 130.

Held, in the circumstances stated below, that the defendant might hold a mortgage in his favour created by a person in insolvent circumstances for certain advances made by the mortgagee contemporaneously with the execution of the incumbrance, and also for future advances intended to be secured thereby, though it was not shewn that such advances were made for the purpose of enabling the mortgagor to carry on his business, but that such mortgage was not a valid security for antecedent advances made by the mortgagee, nor for notes indorsed by the mortgagee for the mortgagor, but not paid, in respect of which therefore he had been a surety only, not a creditor.

This was a bill to impeach a mortgage executed by one John C. Kennedy in favour of the defendant, on the ground that the same had been made in contemplation of insolvency and with a view of fraudulently preferring the defendant. The cause came for examination of witnesses and hearing at the sittings of the Court at Walkerton, in the autumn of 1879.

The other facts sufficiently appear in the judgment.

Mr. *MacLennan*, Q. C., for the plaintiff.

Mr. *Boyd*, Q. C., and Mr. *Kilbourn*, for the defendant.

Smith v. McLean (a), *Evans v. Ross* (b), *Cockburn v. Sylvester* (c), *Allan v. Clarkson* (d), *Commercial Bank v. Wilson* (e), *Kalus v. Hergert* (f); were referred to.

Judgment. SPRAGGE, C.—The evidence does not satisfy me that there was any agreement on the part of *John C. Ken-*

(a) 25 Gr. 567.

(b) 30 C. P. 121.

(c) 1 A. R. 471.

(d) 17 Gr. 570.

(e) 14 Gr. 493.

(f) 1 A. R. 75.

nedy to secure advances on the part of the defendant, until the occasion of the advance to pay *McCardy*; and the direct payment by the defendant to *McCardy*. The agreement then was, that in the event of *Kennedy* failing to obtain the loan, for which he was then negotiating, (out of which, if obtained, he was to repay the defendant,) he should secure the defendant for the advances on the *McCardy* account, and any other advances he might make to redeem grain tickets which had been issued by *Kennedy* and were outstanding, by mortgage on his real property. For the advances on the *McCardy* account, and for payment to other holders of grain tickets made after that agreement, I think the defendant entitled to hold his mortgage of the 3rd of February, 1879. *Allan v. Clarkson (a)*, decided upon the corresponding section of the Insolvent Act of 1864, is an authority for this, and there are other cases in support of the same position.

If it had been proved in the case that the advances on the *McCardy* account, and the advances following it of the like character, were made for the purpose of enabling *Kennedy* to continue his business, the defendant would have been entitled. I apprehend, to hold his mortgage not only for the *McCardy* and subsequent accounts, but for the antecedent advances, and indeed as security for all for which it was agreed that it might be held as security. But it is not proved that the *McCardy* and subsequent advances were made for that purpose; and in all the cases to which I have referred their being so made is treated as essential to their being sustained as security for an antecedent debt. Mr. *Boyd* referred to my language in *Smith v. McLean (b)*, as indicating the contrary; but what I said was in affirmance of such being the rule: "I think the proper conclusion from the evidence is, that the contemporaneous advance was in order to enable *McArthur* to continue his business, applying the

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v.
Harrington.

(a) 17 Gr. 570.

(b) 25 Gr. 567.

1881. money advanced in payment of creditors, and in the belief, honestly and reasonably entertained, that he would thus be enabled to continue his business.”

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v.
Harrington.

Both in *Ex parte Sheer* (a) and *Ex parte King* (b), the Court treat this being the purpose of the advance as essential. In *Whitmore v. Claridge* (c), in the Exchequer Chamber, the judgments are reported very shortly, and do not distinctly refer to this point; but the statement of the case shews, in two passages, that the advance in question was for that purpose, and also for relieving the debtor's property from a charge upon it. The case of *Kalus v. Hergert* (d), in the Court of Appeal in Ontario, is also an authority upon the same point. Moss, C. J., after referring to several of the English authorities, says: "They all shew what the crucial test is, the existence of a *bonâ fide* intention to carry on the business." My conclusion is, that the defendant is not entitled to hold his mortgage as security for the antecedent advances.

Judgment.

A third question arises in regard to the notes to which the defendant was a party for the accommodation of *Kennedy*, and which were still unpaid in the hands of a third party when the mortgage was given. As to such notes it is clear that the position of the defendant was that of a surety, not of a creditor, of *Kennedy*, and the question whether a person in that position was within the Insolvency Act, section 133 or 134, was discussed in the Court of Common Pleas in *Evans v. Ross* (e). It is clear from the report of the case that the Court would have given judgment in favour of the plaintiff, the assignee in insolvency, if the defendant had paid the notes of which he was indorser, and so constituted himself a creditor of the insolvent; not having done this, it was held that he was not a creditor within the meaning of the Act.

(a) 1 Ch. D. 560.

(c) 9 L. T. Rep. 451.

(e) 30 C. P. 121.

(b) 2 Ch. D. 256.

(d) 1 A. R. 75.

It is made a question, however, whether section 130 of the Act does not apply. The second branch of that section avoids "all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability, or having probable cause to believe such inability to exist, or after such inability is public and notorious, whether such person be his creditor or not." These last words, "whether such person be his creditor or not," were not in the corresponding section of the Act of 1864, upon which *Newton v. The Ontario Bank (a)*, was decided. They were added in the Act of 1869, and continued in the Act of 1875.

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 }
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 v.
 Harrington.

There can be no doubt that at the time this mortgage was taken, and at the time it was agreed provisionally that it should be given, *Kennedy* was unable to meet his engagements, *i. e.*, in the proper legal meaning of the term; and there can be no doubt also that by the giving of the mortgage the general body of creditors were obstructed and delayed; and the real question is, whether this inability was known to the defendant, or he had probable cause for believing it to exist. That he had such probable cause must be answered in the affirmative.

Judgment.

His being asked by *Kennedy* to advance money to meet his grain tickets, for which he ought to have had grain in store, or its equivalent in money, was evidence of such inability. The defendant's refusal to advance further, upon the *McCardy* tickets being presented, unless secured, was further evidence, and being with himself was of course knowledge to him. The language he used to *John* and to *James George*, as to his belief that *Kennedy* was "shaky"; *Kennedy's* repeated failures to raise by loan sufficient to pay his debts: what passed at the meeting at which the brother

(a) 13 Gr. 652.

1881. from Guelph was present—all these things, and several
 {
 Smith
 v.
 Harrington.
 } minor circumstances, shew that he had probable cause
 to believe such inability to exist; and shew also,
 though it is not necessary to go so far, that he did
 believe in its existence.

It cannot be contended, I think, that a mortgage is
 not a contract, within the meaning of the Act. Its
 effect is to injure, obstruct, and delay creditors quite as
 much as any contract that may still be *in fieri*. It is
 therefore, within the mischief which the statute was
 designed to prevent.

This accommodation paper, or paper of which it
 was a renewal or substitute, was in existence before
 the agreement to give a mortgage to secure future
 advances.

Judgment.

The result is, that, in my judgment, the defendant is
 entitled to hold his mortgage for the advances in
 respect of the *McCardy* grain tickets, and for subse-
 quent advances, and for those only.

The decree will be for the plaintiff, with costs.

I desire to add, that from what appeared before me
 as to the value of *Kennedy's* property, and the amount
 of his indebtedness, it seems to me that if his estate be
 managed judiciously, and his creditors give him time,
 as some of them at any rate appeared to be willing to
 do, he might probably recover himself.

MCLEAN V. BRUCE.

1881.

McLean
v.
Bruce.

Pleading—Demurrer—Demurrer ore tenus—Costs.

The plaintiffs, *A.* and *J.*, filed a bill for the purpose of having a deed made to the defendant by *J.* declared void, as having been obtained by fraud and misrepresentation. The bill alleged that *J.* had subsequently made a deed of the same property to *A.*, for the purpose of remedying, as far as he could, the wrong he had done by conveying to the defendant the bill alleging that such, deed to *A.*, was made to him “*as trustee for the heirs of A. M.,*” who had died seized. The bill in no place alleged that *A.* was trustee, but in the following paragraph it was stated that “before the execution of such last mentioned deed the heirs of the said *A. M.*, who are the rightful owners of the said land,” &c.

Held, that notwithstanding the absence of any express allegation of *A.* being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was over-ruled with costs.

A demurrer *ore tenus* for misjoinder of plaintiffs. it appearing by the bill that *J.* had no interest in the questions raised, was allowed, without costs.

Roche v. Jordan, ante vol. xx., p. 573, followed.

The bill in this case was filed by *Archibald George McLean* and *John Miller* against *John S. Bruce*, setting forth that in August, 1850, the Hon. *Archibald McLean* obtained a patent for Lot 22, south side of fourth street, in the Town of Cornwall, but never was in actual possession thereof; the plaintiff *Miller*, however, in 1869, “was in possession and those under whom he claimed had been in possession thereof.” Statement

(3) That the plaintiff *Miller* did not at any time set up any claim against the patentee or those claiming under him, but was willing, when called upon, to acknowledge their title. (5) That the defendant on the 27th of April, 1869, went to the said lot in company with a lawyer, and procured *Miller*, who was an illiterate man, unable to read or write, to execute what he afterwards learned was a deed of quit claim of the said lot to the defendant, who took possession by virtue the instrument which was not read

1881. over or explained to *Miller*, and he did not know what the instrument was to which he was persuaded to make his mark, and no consideration whatever was paid therefor, and he so executed the same without professional or other advice. (7) That *Miller* was induced to make his mark to the deed upon the representations made by defendant, that he was the true and legal owner of the said lot, concealing from him the fact that the said Hon. *A. McLean* had been the patentee thereof, and that he or those claiming under him were the rightful owners thereof. (8) That had *Miller* been aware or informed as to the true state of the title to the lot he would never have executed the said quit claim in favor of the defendant.

McLean
v.
Bruce.

Statement.

The bill further stated that (9) *Miller* having afterwards ascertained the nature and effect of the said instrument and the wrong which the defendant had thereby procured him to do to the rightful claimants of the said lot, he did, in order to repair the wrong as far as he could, on the 14th of April, 1879, make a conveyance of the said lot in fee simple to the plaintiff *McLean*, as trustee for the heirs of the said late Hon. *A. McLean*, who died before the last mentioned date.

The bill further stated (10) "that before the execution of the said last mentioned deed the heirs of the Hon. *A. McLean*, who are the rightful owners of the said land, and have been owners since the death of the said patentee, began proceedings in ejectment in the Court of Common Pleas against the said *John S. Bruce*, who had pleaded length of possession in himself and those under whom he claimed, in order to defeat the said heirs, setting up as a part of his title the deed so obtained from *Miller*, and but for which he could not hope to succeed or establish the required length of possession," but which action had not yet been tried.

The prayer of the bill was, (1) that it might be declared that the said deed to the defendant had been obtained on such representations and under such cir-

cumstances as rendered the same invalid : (2) that the said deed might be set aside, and the registration thereof cancelled as a fraud and cloud upon the title of the plaintiffs : (3) that the possession of the said land might be restored to the plaintiffs by the defendant, and the same ordered by this Court ; and for further relief.

The defendant demurred for want of equity.

Mr. *Hoyles*, in support of the demurrer. The bill here alleges that the heirs of the Hon, *A. McLean* are entitled to the land, and had for the purpose of obtaining possession thereof instituted proceedings in ejectment. Under the facts here appearing no right could be conveyed by *Miller* to his co-plaintiff *McLean*. Clearly the only persons to complain of the fraud are the heirs of the patentee, and title by possession having been raised by the defendant at law, this Court will not determine that point now. Besides it is not shewn that *Miller* had any title to convey. *Bruce* has gone into possession; being in possession he can set up his possessory right against all persons other than those entitled to the estate. No doubt the representatives of the estate have a right to file such a bill, but here there is no person before the Court filling that character. The bill states that the alleged invalid deed is being set up against the heirs in the action at law;—being so used the representatives are entitled to take proceedings to get it out of the way. The plaintiff *McLean* does not occupy that position, and there is nothing in the bill to shew his right to do so.

He also objected that *Miller* was an improper party as he was shewn to have no interest in the matter in question.

Mr. *W. Cassels*, contra. The demurrer is really for want of parties ; but the statements in the bill are sufficient to shew that *McLean* is trustee of the estate of the patentee.

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McLean
v.
Bruce.

Argument.

1881. *BLAKE, V. C.*—The ninth paragraph of the bill states “the plaintiff *Miller*, in order to repair the wrong as far as he could, did on the 14th day of April, 1879, make a conveyance of the said lot in fee simple to his co-plaintiff *McLean*, as trustee for the heirs of the late Honourable *Archibald McLean*,” and the tenth paragraph continues the story: “Before the execution of the said last mentioned deed, the heirs of the said the Honourable *Archibald McLean*, who are the rightful owners of the said land,” &c.

I should have doubted that this statement, standing alone, was a sufficiently distinct averment that the plaintiff *McLean* was trustee for the heirs of the Hon. *Archibald McLean*. But when, in connection with this averment, there is the fact that he that is named “a trustee” has filed a bill to sustain the title of those “who are the rightful owners,” and no other title or interest is shewn in him, I think there is, by this act on his part, sufficient to shew that he has accepted the office of trustee, and is therefore entitled to litigate the matters set forth in the bill.

Judgment.

By the pleading it is clear the co-plaintiff *Miller* has no interest in the questions raised, and therefore the demurrer for misjoinder must be allowed. The demurrer filed will be overruled with costs—the demurrer *ore tenus* allowed without costs, following *Roche v. Jordan (a)*. The plaintiff, of course, can amend.

1881.

RUTHERFORD V. SING.

Specific performance—Substituting agreements—Balance of evidence.

In a suit for specific performance it was shewn that the plaintiff had agreed to convey to the defendants certain lands in consideration of his being paid one-third of the sum for which defendants should be enabled to sell the same. This agreement was subsequently cancelled on the defendants undertaking to pay plaintiff \$2000, one-half by a note, the other half by the conveyance of certain town lots at an ascertained valuation; and this second or substituted agreement the plaintiff sought to enforce. The defendants set up that in consequence of their ascertaining that plaintiff had not a title to the land conveyed to them, a fresh agreement was entered into to the effect that the defendants should be at liberty to sell the land, and pay to plaintiff one-third of the net proceeds, and which they asserted they had done. At the hearing the Court (SPRAGGE, C.,) being satisfied that the defendants' account of the transaction was correct, refused the relief claimed, but offered the plaintiff a reconveyance on payment of costs, which the defendants assented to, or a decree upon the footing of the third or last mentioned agreement upon payment of costs: On rehearing, this decree was affirmed, with costs.

THIS was a bill filed by *James Rutherford*, against *Cyrus Richmond Sing* and *Andrew Grier*, setting forth that the plaintiff being possessed of certain real estate consisting of three quarters of an acre in Orillia, in the year 1874 entered into an agreement in writing with the defendants to sell the same to them for one-third of the value thereof, such value to be ascertained as soon as the defendants sold the said lot.

The bill further stated that shortly afterwards the defendants requested the plaintiff to waive and put an end to that agreement, and substitute another agreement therefor, which the plaintiff agreed to and he did accordingly give up the said agreement to be cancelled. Accordingly on the 3rd of December, 1874, a fresh agreement was come to, dated on that day, whereby the plaintiff agreed to sell and convey the said land to the defendants for \$2000, payable, \$1000 in eighteen months, and \$1000 by the conveyance of certain town

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 Sing.

lots in the town of Thornbury, or the town of Meaford, (as they the defendants might think proper) to that value at the ordinary selling price of such lots; such lots to be conveyed within two years from that date. The bill further stated that the plaintiff had fully performed such agreement by executing with all necessary parties a deed dated that day, of the said land in Orillia, for the expressed consideration of \$2000, and that on that day the defendants gave to the plaintiff their joint and several note, at eighteen months, for \$1000, and a written agreement duly signed by them agreeing to convey the said town lots in satisfaction of the other \$1000, and such promissory note and agreement was left in the hands of one *Joseph Rooke*, to hold for all parties.

Statement.

The bill further alleged that on the 9th of October, 1876, the defendants paid to plaintiff \$36.66, on account of the \$1000 note, but did not pay the balance of such note, though long overdue, neither did they convey the said town lots to the plaintiff; and that they had refused to carry out the said agreement.

The plaintiff submitted that he was entitled to have the said agreement specifically enforced, the said town lots conveyed, and the balance of said note paid.

The bill further alleged that the defendants at times pretended that the said first agreement was still in force, and that the said note and agreement were taken and made merely as collateral security for the due performance of such first agreement; the plaintiff charged, however, that such note and agreement were taken and made in substitution for the first agreement given up to be cancelled, and were not in any way collateral thereto.

The prayer of the bill was, (1) that the agreement of the 3rd December, 1874, might be specifically performed, (2) that defendants might be ordered to pay the balance of the note for \$1000, together with costs of suit, and for further and other relief.

The defendants, by their joint and several answer, admitted the making of the said agreement of 1874, also the rescinding thereof, and the making of the second agreement, substantially as stated in the bill. They asserted, however, that after such second agreement was made, the defendants ascertained, as the fact was, that the plaintiff had not any title to the said land, or at most a very defective one, and could not give a title to the defendants, as stipulated for in the agreement; of which fact as soon as ascertained they informed the plaintiff, and offered to release him from his agreement; and that the plaintiff was well aware of the nature of his title during all their negotiations, and falsely and fraudulently represented to the defendants that his title was good, and so in fact defendants never had any consideration for their said note.

The answer further alleged that the plaintiff admitted the infirmity of his title, and an agreement was thereupon entered into between the defendants and him, that they (the defendants) should be at liberty to make what they could out of the property, and allow the plaintiff one-third of the net profits; and in accordance with that agreement they did pay the plaintiff the sum of \$36.66 mentioned in the bill, which was his share in full under the said last mentioned agreement.

The cause came on for examination of witnesses and hearing at the sittings of the Court at Owen Sound in the Spring of 1878, before Spragge, C., who, without calling on defendants' counsel, held that the plaintiff was not entitled to a decree as asked, but that he might take a reconveyance, or a decree upon the footing of what is called the third agreement; the plaintiff to pay the defendants' costs, which they were to be at liberty to retain out of the proceeds of sale to be received; or if a reconveyance, it should be upon payment of costs.

The plaintiff thereupon set the cause down for re-hearing, and the same came on to be argued before the full Court on the 24th day of February, 1879.

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Rutherford
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Sing.

Statement.

1881. Mr. *McCarthy*, Q. C., and Mr. *Rye*, for the plaintiff.

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Mr. *Moss*, and Mr. *Creasor*, for the defendants.

BLAKE, V. C. —I have read the evidence in this case, and I think the true conclusion from it is, that there were three agreements made between the parties. The first, for a division of the proceeds of the sale of the premises ; the second, for the payment of a sum named; and the third, a return to the first agreement, and in place of payment of a sum certain, a division of the net proceeds of the sale. We have on the one side the evidence of the parties interested, *Sing* and *Grier* ; the evidence of *Rooke*, a disinterested witness ; the memorandum made ; the payment of the specific sum—the one-third of the \$100—and the probabilities of the case ; and opposed to this, the unlikely and unsatisfactorily-told story of the plaintiff.

Judgment. I think, on the evidence, that the defendants were not informed of the fact of the foreclosure until after the second agreement was made, and that upon being so informed the third and last, and the agreement which binds at present, was made. The defendants were at liberty to shew the circumstances under which these papers were deposited, in order to prevent their being put to a use other than that intended by the parties.

The plaintiff by his bill has treated this as a suit for specific performance. He says, in paragraph eight of the bill: "The plaintiff submits that he is entitled to have the said agreement specifically enforced, and the said town lots conveyed, and the balance of the said, note paid to him, he hereby offering to perform the said agreement so far as it remains to be carried out by him." And by the first clause of the prayer he asks "That the defendants may be ordered to specifically perform and carry out the said agreement of the third day of December, 1874, the plaintiff hereby offering to

perform the same so far as it remains to be carried out on his behalf." The plaintiff, I think, took the true view of the case, and filed his bill, as he was entitled to, for the fulfilment by the defendants of the agreement, so far as it had not been carried out.

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 Sing.

The dealing with the note, which at first sight is inconsistent with the case of the defendants, as explained, does not negative their statement. It was not unreasonable that the papers which evidenced the second agreement should be held until the fulfilment of the agreement as altered. This I believe to have been the arrangement made. It explains why the papers were still retained, and, with the oral testimony, shews how the \$36.66 came to be paid.

Judgment.

I think the decree made should be affirmed, with costs.

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TO THE

PRINCIPAL MATTERS.

ABILITY TO PAY.

Where money is lent to be repaid when the borrower is able, his ability may be shewn by a slight amount of evidence, such as is open to public observation of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience.

Re Ross, 385.

ACCUMULATION.

See "Corporation," 3.

"Will," &c., 11.

ACQUIESCENCE.

See "Nuisance."

ADDING PARTIES.

See "Injunction," 1.

ADMINISTRATOR *AD LITEM*.

An administrator *ad litem* had allowed suits to be brought in his name without the sanction of the Court, which both he and his solicitor had been notified it was necessary should be obtained and a

sum of \$2,038.37 for costs in respect of such suits had been paid out of the funds to the solicitor, which, it was alleged, had been so paid improvidently. The Court in a suit by the executors against the administrator *ad litem* directed a taxation of the solicitor's bill, when a sum of \$2,012.81 was disallowed, and thereupon the sureties for the administrator, who was unable to pay, applied by petition for an order that the solicitor should repay this amount with costs.

The Court [PROUDFOOT, J.] under the circumstances made the order asked, although no taxation of the costs as between the solicitor and his client had been had, and it was denied that any arrangement existed that the solicitor should only be paid such costs as the administrator might be allowed against the estate or that any privity existed between the solicitor and the executors, and a bill filed by the executors against the administrator and his solicitor had as against the latter been dismissed with costs on the ground of such want of privity. Such dismissal, not having been on the merits, could not be claimed to be *res judicata*.

Crooks v. Crooks, 1 Gr. 57, remarked upon and followed.

Re Donovan, Wilson v. Beatty, 280.

[Reversed on Appeal, 27th October, 1883.]

ADMINISTRATION.

1. In administration proceedings the widow of the testator claimed to have received as a gift from her husband a promissory note of one *P.* made payable to the testator, and not indorsed by him. The widow, it was shewn, had had possession of this, as well as of other notes belonging to the estate, during her husband's lifetime. The only evidence corroborating that of the widow was that of *P.*, who stated this note was spoken of by the testator as belonging to his wife, that he said he had given it to her, and he hoped he (*P.*) would pay it to her when he was able. Evidence in opposition to this was also given.

Held, on appeal from the Master at London, that a good gift *inter vivos* had not been established, and that such note formed part of the general assets of the estate, and the widow was ordered to pay the costs of the appeal.

Re Murray—Purdom v. Murray, 443.

2. In a suit for administration, it appeared that the personal representative had kept very imperfect accounts of the estate, and that those brought into the Master's office had been made up partly from scattered entries and partly from memory.

Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs from the defendant up to the hearing, although no loss had occurred to the estate.

It was also shewn that the personal representative had invested the moneys of the estate in land out of the jurisdiction of the Court as well as on personal security, but no loss had been sustained, all having been repaid by the borrowers.

Held, that these facts did not constitute any ground for depriving her of the costs of suit subsequent to the decree.

Killins v. Killins, 472.

ADVERTISING SALE.

See "Sale by Assignee," &c.

AGREEMENT NOT TO SELL GOODS.

See "Consignment of goods," &c.

ALIMONY.

On an application to reduce the amount of alimony payable by the defendant to the plaintiff, the property of the defendant was variously estimated (lands and personalty) at from \$2,938 to \$6,000, and the evidence of the defendant, when cross-examined upon his affidavit filed by him in support of the motion, being unsatisfactory, the Court, [FERGUSON, V. C.,] refused to interfere with the report of the Master fixing the amount, which had been paid under such report for about eighteen months without objection; but the result of the application was not to be considered conclusive against the defendant on any other motion he should be advised to make.

Holway v. Holway, 41.

See also "Fraudulent Conveyance," 2.

"Pleading," 3.

AMENDED STATEMENT OF CLAIM.

See "Pleading," 2.

AMENDMENT.

[SERVICE OF NOTICE CONTAINING.]

See "Injunction," 4.

AMENDMENT OF CANON.

See "Church Society," 3.

APPEAL.

See "Injunction," 6.

APPEAL FROM MASTER.

On an appeal from the Master on a question of the weight of evidence, the Court, though not satisfied as to what was the actual truth of the case, could not say that the Master was wrong, and therefore dismissed the appeal, with costs; liberty being given to the appellant however to examine the witnesses again at the next sittings before the learned Judge, who had heard the appeal, so as to enable him to dispose of the matter with greater satisfaction to himself, in which case costs would be reserved.

McArthur v. Prittie, 500.

APPOINTMENT OF RECEIVER.

After a decree had been pronounced directing the appointment of a receiver, but before the appointment was completed, the defendant company had made a payment to a creditor, which the plaintiff *F.*, a judgment creditor, alleged to be a fraudulent preference, and moved for an order that the receiver should take proceedings to recover the money so paid.

Held, that as the payment complained of took place before the actual appointment of the receiver, it was more reasonable that those who were interested at the time the payment was made, parties to the suit, and who objected to what had been done, should in person apply for the appropriate relief.

Fox v. Nipissing—Gooderham v. Nipissing, 11.

ARBITRATION.

1. *Seemle*, that the combined effects of secs. 377 and 380 of the Municipal Act, is to enable the arbitrators in cases coming within these sections to extend the time for making their award beyond the month.

Township of Thurlow v. Township of
Sidney, 497.

2. The plaintiff municipality sued upon an award whereby the defendant municipality was ordered to pay their proportion of the cost of a drain constructed by the plaintiffs. It was shewn that the arbitrators met frequently and adjourned from time to time, counsel for the defendants appearing before the arbitrators and raising no objection to such adjournments, or that the month from the date of the appointment of the third arbitrator, as prescribed by sec. 377 of the Municipal Act had elapsed without any award having been made.

Held, that an award made after the expiry of the month was valid.

Ib.

ARREST, WRIT OF.

Where the plaintiff in an alimony suit obtains a writ of arrest and the defendant gives bail, and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into Court, to be applied from time to time in payment of the alimony and costs : and

Semble, that upon such payment the sureties are entitled to be discharged from their bond.

Needham v. Needham, 117.

Where under a writ of arrest a caption takes place, the sheriff is entitled to a bond for double the amount marked upon the writ.

Ib.

ASSENT TO DEVISE.

See "Quieting Titles Act," 1.

ASSESSMENT, VALIDITY OF.

See "Tax Sale," 1.

ASSIGNEE IN INSOLVENCY, SALE BY

See "Sale by Assignee," &c.

ASSIGNMENT OF MORTGAGE.

See "Mortgage," &c., 1, 2, 5.

INDEX TO THE

AWARD.

See "Municipal Act," 3

—————, TIME FOR MAKING.

See "Arbitration," 1.

BAIL.

See "Arrest, Writ of".

BALANCE OF EVIDENCE.

See "Specific Performance," 2.

BEQUEST TO CHILDREN.

See "Will," &c., 6.

————— TO SONS AND DAUGHTERS AND
THEIR CHILDREN.

See "Will," &c., 9.

————— OF FARM STOCK.

See "Will," &c., 10.

BOUNDARIES

See "Riparian Owners," 14.
"Surveys," 1.

BUILDING SOCIETY.

The plaintiff, on becoming a member of the defendant company, agreed to accept his shares subject to the rules of the company. Rule 6 was to the effect that in case of default of payment of dues for a year, the directors might forfeit any shares so in default. The plaintiff being in default for a year and upwards, the directors

declared his shares forfeited, and this proceeding was afterward confirmed at a meeting of the shareholders. The plaintiff thereupon instituted proceedings to have such forfeiture declared invalid, on the grounds, (1) that notice of the intention to forfeit had not been given to him, (2) that notice of the forfeiture had not been served on him, so that he had been unable to appeal to the shareholders; (3) that the resolution did not expel the plaintiff from membership; (4) that the plaintiff's name was not set forth in full in such resolution; it did not specify the shares to be forfeited, and other persons were included whose shares were jointly forfeited; (5) that no notice had been given of the holding of the annual meeting for the election of directors, so that the directorate was not legally constituted; (6) that one of the directors who voted for the forfeited shares had become insolvent under the Act of 1875, although his shares continued to stand in his name in the books of the company; (7) that it was not shewn that proper and efficient notice had been given at the meeting of the directors at which such forfeiture had been declared; (8) that the plaintiff had capital at his credit in the company out of which the arrears might have been paid; and that by a by-law of the company, "all fines and forfeitures should be charged to members liable, and, if not paid, deducted from capital at the credit of such member."

Held, that these objections could not prevail, and that as to the last, this was not such a forfeiture as was referred to in the rules.

Nellis v. Second Mutual Building
Society of Ottawa, 399.

See also "Vendors and Purchasers' Act."

CALLS, NOTICE OF.

See "Notice," &c.
"Partnership."

CANON, AMENDMENT OF.

See "Church Society," 3.

CERTIFICATE OF SALE.

See "Tax Sale," 2.

CHATTEL MORTGAGE.

The plaintiff carrying on the business of a druggist, mortgaged his stock-in-trade to the defendant; the instrument by which it was effected stipulating that the defendant should take possession of the stock and premises, to hold for four months in order to secure re-payment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the money being expended by the defendant with the assent of the plaintiff; other money being part of the profits of the business were thus reinvested in new stock; some of the old stock remaining in specie. The matter was referred to the Master at Belleville, to take the accounts of the dealings between the parties. Before the Master made his report, the plaintiff applied on petition for the appointment of a receiver, on the ground that the mortgage had been paid in full.

Held, (1) that the new stock belonged to the mortgagee himself and the plaintiff could therefore have no claim upon it, and as the Master had not found which party was indebted to the other, his finding would not be anticipated by the appointment of a Receiver: (2) that although the defendant's right on default, was to sell the original stock *en bloc* after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate; and so long as the plaintiff chose to allow the business to go on under the defendant's control, he had the right so to conduct it, subject to being called on to account.

Foster v. Morden, 25.

See also "Insolvent debtor," 1, 2.

CHILD BEARING, WOMAN PAST.

See "Trustee," &c., 2.

CHURCH SOCIETY.

1. *Quære*, whether a written license to a parson is necessary in the Diocese of Huron; but if necessary the defendants, having placed the name of the plaintiff on the list of clergymen entitled to share in the Commutation Fund, could not afterwards object to the want of such license in a suit instituted by him to enforce payment of his share of such fund.

Wright v. The Incorporated Synod of the
Diocese of Huron, 348.

2. The right to pass by-laws necessarily imports a right to repeal the same, but this cannot be done to the prejudice of a party who has obtained rights under such by-laws, without his assent. Therefore the Church Society of the Diocese of Huron, having received certain moneys, invested the same and then appointed a committee to consider the future application of the surplus of such fund, and on the report of the committee passed a by-law providing that every clergyman of not less than eight years' active service in the diocese, who was not under ecclesiastical censure, not on the Commutation Fund, and not in receipt of any salary, should be entitled to \$200 a year. Under such by-law the plaintiff was placed on the list of clergymen entitled to such allowance of \$200 from the surplus interest of such fund, and for some time received it, and the defendants, under an Act of the Legislature, succeeded the Church Society.

Held, that the plaintiff had a vested interest in such surplus interest of which he could not be deprived, so long as he came within the provisions of the by-law under which he has been placed on such list; and a subsequent by-law repealing all former by-laws, and declaring that all former grants made in pursuance of prior by-laws should cease, could not affect such vested right of the plaintiff.

Ib.

3. *Semble*, that the amendment set out at page 362, being to strike out a certain Canon and substitute another for it, though moved as an amendment to a proposed amendment of such Canon, was rather a substantive motion and should have been brought before the Synod through the standing committee.

Ib.

CLASS, PARTY SUING ON BEHALF OF A.

See "Pleading," 1.

CO-EXECUTOR, LIABILITY OF.

See "Executor," &c.

COLLUSION.

See "Insolvent Debtor" 1.

COMMON COUNTS.

[JUDGMENT ON.]

See "Insolvent Debtor," 1.

COMPENSATION TO OWNERS OF LANDS.

[TAKEN FOR CANAL.]

See "Valuation of Lands," &c.

CONFLICTING STATEMENTS.

See "Solicitor and Client," 2.

CONSENT DECREE.

A decree had been made on consent, referring to the Master the question whether or not the defendant had performed certain work for the plaintiff at a specified rate, who reported that he had not. On appeal, the Court [BLAKE, V.C.] considering that this was a question that should have been disposed of by the Court, set aside the report and directed a trial to be had upon that issue, reserving the costs of the proceedings before the Master and of the appeal.

Held, on further directions, that these costs having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should bear his own costs.

Dalby v. Bell, 336.

CONSIDERATION, WANT OF.

See "Fraudulent Conveyance."

CONSIGNMENT OF GOODS SUBJECT TO
PAYMENT.

The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made certain payments. Without making such payments, however, A. did sell the oil without the knowledge of the plaintiff.

Held, (following *Walker v. Hyman*, 1 A. R. 345) that the plaintiff was entitled to recover from the purchaser the price of the oil,

although his purchase had been made in good faith and without any notice of the stipulation between the plaintiff and A.

McDonald v. Forrestal, 300.

[Affirmed on Appeal 23rd Sept., 1882, and subsequently in Supreme Court, 19th June, 1883.]

CONSOLIDATION OF MORTGAGES.

The rule that a mortgagee shall not be redeemed in respect of one Mortgage, without being redeemed also as to another mortgage created by the same mortgagor, applies as well in a suit to foreclose as to redeem.

Johnston v. Reid, 293.

In such a case the property embraced in one mortgage realized more than sufficient to discharge it. The plaintiff, an execution creditor of the mortgagor, obtained a security on the lands comprised in such mortgage which was registered after it, but without notice thereof. On a sale of the lands embraced in another mortgage a loss was sustained by the mortgagee.

Held, (1) that the defendant, the mortgagee, had not the right, as against the plaintiff, to consolidate his mortgages, and make good the loss on the second out of the surplus on the first sale, the policy of the Registry Act being to give no effect to hidden equities. (2) That by taking a mortgage, and thus giving time to the mortgagor, the plaintiff was a holder of his mortgage for value.

Ib.

CONTRACT BY PERSON IN INSOLVENT CIRCUMSTANCES.

See "Mortgage," 8.

CONVERSION OF REALTY INTO PERSONALTY.

See "Will" &c., 1.

CONVEYANCE BY ILLITERATE PERSON.

See "Husband and Wife."

INDEX TO THE
CORPORATION.

1. A company receiving money on deposit, which is placed to its credit at a bank, is liable for the money so received, though the taking of money by deposit be *ultra vires*; and if the officers of the company use such moneys in other *ultra vires* transactions, that may be a proper matter for the shareholders to charge those officers with, but it is not one with which the depositor has anything to do.

Walmsley v. Rent Guarantee Co., 484.

2. One *E.* advanced \$4,000 to *I. & M.*, on the guaranty of the defendant company, clearly acting *ultra vires*, who obtained, as security for such guaranty an order from *I. & M.*, on the water works company, for the amount. *I. & M.* afterwards induced the defendants to give up the order on replacing it by orders for half the amount. *E.* recovered judgment by default against the defendants, and by *sci. fa.* realized the amount of his loan.

Held, affirming the Master's report, that *B.*, who was one of the directors of the defendant company, and who had been instrumental in procuring the above guaranty, was properly charged with the amount the defendants had lost through the delivery up of the order on the water works company; but that he was not liable for the balance of the claim of *E.*, since it had been made up to the defendants by the moneys realized on the orders by which the order so delivered up had been replaced.

Ib.

3. An incorporated company, by its charter, was authorized to carry on business in the management of real and personal property; guarantee rents thereof; to collect rents, &c.; procure loans, and to negotiate the sale and purchase of houses, mortgages, stocks, and other securities, "and generally to transact every description of commission and agency business, except the business of banking, and the issue of paper money or insurance."

Held, that this did not confer any power upon the company to discount notes guaranteed by their indorsement; neither had they the right to speculate in the purchase of mortgages or other securities, although they might have been justified in investing any surplus capital or accumulation of profits until the same was required.

Ib.

CORROBORATIVE EVIDENCE.

Where each item in an account against the estate of a deceased person is an independent transaction and stands upon its own merits, and would constitute a separate and independent cause of action, some material corroboration of the testimony of the party interested in

enforcing the demand must be adduced as to each item in order to satisfy the tenth section of the Evidence Act, R. S. O. ch. 63.

Re Ross, 385.

See also "Administration."

COSTS.

See "Administration, 1, 2.
 "Consent Decree."
 "Fraudulent Conveyance," 1.
 "Judgment," &c., 1.
 "Municipal Act," 3.
 "Pleading," 5, 6.
 "Solicitor and Client," 2.
 "Specific Performance," 1.
 "Vendor and Purchaser," 2.

CO-TRUSTEES, LIABILITY OF.

A testator who, by his will, expressed the fullest confidence in *C.* (one of his trustees), directed them to be guided entirely by the judgment of *C.* as to the sale, disposal, and re-investment of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby. *C.* having made unauthorized investments of these moneys which proved worthless, the Master charged his co-trustee *B.* with the amount thereof.

Held, that even if at the suit of creditors *B.* might have been chargeable, yet as against legatees he was exonerated.

Burritt v. Burritt, 331.

COVENANT, JUDGMENT ON BREACH OF.

See "Insolvent Debtor," 2.

CREDITORS' RIGHTS

[AND SUITS.]

A receiver was appointed under the decree in this suit to collect revenue, and, after paying expenses, to pay the balances into Court, which were to be paid out on the report of the Master to the parties entitled as found by him. *S.*, pursuant to advertisement for creditors, proved his claim. The Master had not made his report. By 34 Vict. ch. 61 (O.) the defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds

were to be paid out on the order of *C.* and *F.*, who were appointed creditors' trustees, in payment of all money necessary to be paid for the discharge of the receiver in this suit. An order of Court was made, on the application of the defendants, discharging the receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came under it should take fifty cents on the dollar.

Held, that the position of affairs having altered since the time at which *S.* had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible.

Lee v. Credit Valley R. W. Co., 480.

DECREE AMENDING—TO CONFORM TO JUDGMENT.

See "Judgment," 1.

DEMURRER.

See "Fraudulent Conveyance," 2.
 "Mechanics' Lien Act," 1.
 "Municipality," 1.
 "Pleading," 1, 2, 3, 4, 5.

DEMURRER *ORE TENUS*.

See "Pleading," 6.

DESCRIPTION,

See "Tax Sale," 1.

DEFAULT IN PAYMENT ON SHARES.

See "Building Society."

DEFAULT OF EXECUTOR.

See "Executor," &c.

DEFENDING ONE SUIT AND WITHDRAWING PLEA IN ANOTHER.

See "Fraudulent Preference."

DISCOUNTING NOTES.

See "Corporation," 3.

DIGNITY OF COURT.

The question involved being of a public nature, the fact that the award was for an amount which in other cases would be beneath the dignity of the Court, was not any reason why the Court should not entertain the suit.

Harding v. Cardiff, 308.

DISCHARGE OF SURETIES.

See "Arrest, Writ^{of}."

DISTRIBUTION OF ESTATE.

See "Will," &c., 11.

DIVISIONAL COURT, JURISDICTION OF.

See "Rehearing."

DOWER.

1. A testator, amongst other things, made certain bequests in favour of his widow, and directed that his farm, the only real estate he possessed, should be leased to two of his three brothers named as executors until such time as his nephew and son attained twenty-one.

Held, that under these circumstances, the widow was bound to elect between her dower and the benefits given by the will.

Rody v. Rody, 324.

2. The general rule as between a tenant for life and the remainderman in respect of a charge upon an estate, is that the tenant for life must keep down the interest on such charge, and the duty of the re-

remainderman is to pay the principal. This rule was applied where a widow claimed to have dower out of her husband's estate, which at the time of her marriage was subject to certain legacies and a mortgage, in preference to an annuity given her by his will; she being held bound to pay one-third of the interest on these claims until they became payable, after which the remainderman must pay all the interest as well as the principal thereof.

Reid v. Reid, 372.

3. The testator made a provision in favour of his widow, much more advantageous to her than her interest as doweress, and which was expressly given in lieu of dower, and given during widowhood. The will was acted upon for two years, when the widow married a brother of her deceased husband, and thereupon filed a bill alleging that she had accepted the provisions and bequests made for, and given to her by the will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and she now sought to have dower assigned to her.

Held, that the rule "*Ignorantia juris neminem excusat*" applied and the bill was dismissed, with costs.

Gillam v. Gillam, 376.

See also, "Will, Construction of," 1, 7.

EASEMENT.

See "Riparian Owners," 2.

ELECTION.

See "Dower," 1, 3.

"Will," &c., 1, 7.

ESTATE TAIL.

See "Will," &c., 12.

ESTOPPEL.

See "Mortgagees," &c., 5.

EXECUTOR, DEFAULT OF.

H. and *C.* were appointed executors. *H.* took upon himself the actual management of the estate with the knowledge and consent of, but not under any express agreement with *C.* *H.* applied a sum of money to his own use, but of this *C.* was not aware. The will contained the usual indemnity clause exonerating each from liability for the other.

Held, that *C.* was not liable for the sum appropriated by *H.*

King v. Hilton, 381.

EXECUTOR, RETAINER IN FULL BY.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full ; as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations.

Re Ross, 385.

EXPROPRIATING LANDS.

See "Municipal Act," 1.

EXTRAORDINARY EXPENSES.

See "Receiver."

FARM STOCK, BEQUEST AND FUTURE
DIVISION OF.

See "Will" &c., 10.

FIXTURES.

See "Mortgage" &c., 6.

FOREIGN SECURITIES.

See "Co-Trustees, Liability of."

FORFEITURE OF SHARES.

See "Building Society."

FRAUDULENT CONVEYANCE.

1. In a suit to set aside a conveyance on the ground of want of consideration, it was alleged that the grantor was bodily and mentally infirm, but the evidence shewed that the only difference between the grantor and grantee was, that the former was an older man than the other. The grantee, however, had given about the full market value of the land conveyed, and to secure part of the purchase money had executed a mortgage thereon. In dismissing the bill the Court [FERGUSON, J.,] directed the costs of the defendant to be deducted from the amount due under the mortgage, if the costs were not paid within a month, it being alleged that the next friend of the plaintiff was worthless.

Travis v. Bell, 150.

2. The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and that for that purpose her husband fraudulently conveyed all his lands to the co-defendant, and the bill prayed to have such conveyance declared fraudulent. The grantee in the impeached conveyance demurred for multifariousness, for want of equity and want of parties. The Court, [BOYD, C.,] over-ruled the demurrer on the first two grounds, but allowed the demurrer for want of parties; the plaintiff not having recovered judgment and execution could only sue in a representative capacity—that is, on behalf of herself and all other creditors. *Longeway v. Mitchell*, ante vol. xvii, p. 190; *Turner v. Smith*, ante vol. xxvi. p. 198; *Oulver v. Swayze*, *Ib.* 395, and *Morphy v. Wilson*, ante vol. xxvii. p. 1, considered and followed.

Campbell v. Campbell, 252.

See also "Pleading," 3.

FRAUDULENT PREFERENCE.

The defendant *C.*, defended an action brought against him by the plaintiffs, while in an action brought against him by the defendant, *S.*, he entered an appearance and filed a plea some days before the same were due, and on the day of filing the plea filed a *relicta verifikatione*, whereupon judgment was signed and execution issued.

Held, that these proceedings did not offend against the provisions of the Act R. S. O. ch. 118, sec. 1: following in this the decisions in *Young v. Christie*, ante vol. 7 p. 312; *McKenna v. Smith*, ante vol. 10 p. 40; *Labatt v. Bixell*, ante vol. 28 p. 593; and *Mackeddie v. Watt*, decided in appeal 28th Nov., 1881.

Heaman v. Seale, 278.

FRESH EVIDENCE.

See "Review."

GIFT *INTER VIVOS*.

See "Administration."

HIDDEN EQUITIES.

It is the policy of the Registry Act to give no effect to hidden equities.

Johnston v. Reid, 293.

HIGHWAYS, STREETS AND—REPAIRS OF.

See "Municipality," 1.

HUSBAND AND WIFE.

A married woman, who could neither read nor write, and was possessed of real estate, was asked to join in a conveyance by way of mortgage in order to bar her dower in her husband's land. The mortgagee's solicitor knew that she had objected to mortgage her land, and it was not explained to her or her husband that, by her joining, her estate would be liable in any way. In fact the husband and wife were made joint grantors, and jointly covenanted for payment. After the death of the husband proceedings were instituted against his widow to compel payment by the assignee of the security. The Court [BOYD, C.] under the circumstances, declared the instrument invalid as against the separate estate of the widow, and dismissed the bill, with costs.

Burrows v. Leavens, 475.

IGNORANTIA JURIS, &c.

See "Dower," 3.

ILLITERATE PERSON.

[CONVEYANCE BY.]

See "Husband and Wife."

IMPERFECT ACCOUNT.

See "Administration," 2.

IMPROVIDENCE.

See "Marriage Settlement," 2.

"IN CASE OF DEATH," MEANING OF.

See "Will," &c., 6.

INCUMBRANCES, VENDOR'S DUTY AS TO.

See "Vendor and Purchaser," 1.

INFANT, RIGHTS OF—AS COPARTNERS.

See "Injunction," 1.

INJUNCTION.

1. In a suit by an infant partner against his co-partner praying for dissolution, receiver, reference, &c., after a decree *pro confesso*, and during the taking of the accounts—under an agreement for a continuance of the partnership business for that purpose—certain creditors of the firm obtained judgments and executions at law against the partner of the infant, who was not informed of these proceedings, until the sheriff had seized and was about to sell the whole of the partnership property.

Held, on motion for injunction, that the proceedings at law were not within the provisions of R. S. O. ch. 123, sec. 8, and that the sale should be restrained.

Held, also, that the execution creditors might be made parties for that purpose on motion simply.

Young v. Huber, 49.

2. The plaintiff, in consideration of \$25.00 paid by defendant, executed in his favour a lease of a small plot of land at a yearly rent of one cent, if demanded, with the right on the part of the defendant to remove all buildings at any time during the lease. The lease contained no covenant on the part of the lessee, other than those to pay rent, and to pay taxes, and it was silent as to any right on the part of the lessee to bore for oil.

Held. that *primâ facie*, the lessee had not the right to bore for oil, and having done so, and commenced operations in pumping crude oil, an injunction was granted to restrain the further removal of oil from the premises until the hearing of the cause.

Lancey v. Johnston, 67.

3. A motion by the plaintiff to continue an *ex parte* injunction was refused, with costs, but at the same time leave was given to amend the bill, and another interlocutory injunction was granted *ex parte*. On the return of the motion to continue the latter, it was objected that the costs of the former motion which had not been taxed were not paid.

Held, that the non-payment was no objection to the motion being proceeded with.

Taylor v. Hall, 101.

4. The proposed amendments of the bill were set out substantially in the order for the injunction, which was served.

Held, that as the defendant had thereby notice of the proposed amendments, the objection that the amended bill had not been served was not entitled to prevail.

Ib.

5. Where there appeared to be a substantial matter to be tried and no irreparable injury would be done by preserving the subject matter of the suit *in medio*, an injunction restraining the defendant from dealing with it was continued to the hearing.

Ib.

6. The 27th section of the Court of Appeal Act, R. S. O., ch. 38, does not apply to proceedings by injunction, whether the writ has been issued before or after decree in the cause.

McLaren v. Caldwell, 438.

INSOLVENCY.

See "Sale by Assignee," &c.

INSOLVENT ACT.

[CREDITORS NOT SCHEDULED UNDER.]

See "Parties," 2.

"Secured Creditors, rights of."

"Trust for Creditors."

INSOLVENT ACT OF 1875.

A Mortgage is a "Contract" within the meaning of the Insolvent Act of 1875, section 130.

Smith v. Harrington, 502.

INSOLVENT DEBTOR.

1. *L.* being in insolvent circumstances executed a chattel mortgage to *D.* who was cognizant of his state; and shortly after the execution thereof, in collusion with the mortgagee, but against an expressed prohibition, made a delivery or pretended sale of the goods to one *M.*, which was contrary to the terms of the mortgage, and the mortgagee sued for breach of the covenant therein, adding the common counts; the mortgage having then three months to run.

Held, that the mortgage and judgment, so far as the covenant was concerned, were void, as being a fraud upon creditors.

King v. Duncan, 113.

2. The mortgagor was really indebted to the mortgagee upon an account, though the time for payment had been extended three months by the mortgage.

Held, that the mortgagee was entitled to retain his judgment on the common counts as there was not any violation of the Act, (R. S. O. ch. 118,) in the debtor when sued not insisting on the fact of the credit not having expired, or that the debt had been merged in the mortgage.

Ib.

INTEREST.

The circumstances under which interest on a claim ought to be allowed or refused in the Master's office, considered and acted on.

Re Ross, 385.

See also, "Dower," 2.

INTERIM INJUNCTION.

See "Varying Minutes."

JUDGE, TRIAL BY.

See "Rehearing."

JUDGMENT, AMENDING DECREE TO CONFORM TO.

By the decree an assignment of a bond was declared to have been by way of security only; and further, that the plaintiff was entitled to certain credits, and referred it to the Master to take the accounts. In proceeding with the accounts the defendant was hampered by this declaration in the decree, as the Master felt bound by it, whereupon the defendant moved upon petition to amend the decree so as to make it conform to the judgment: FERGUSON, J., before whom the motion was heard, being of opinion that the judgment was directed solely to the fact that the bond was assigned as a security only, and that the view taken as to the credits was a ground for so holding, and was not a substantive part of the judgment, and therefore that the declaration as to the credits was unauthorized, ordered the same to be struck out of the decree upon payment of costs of the application, and of all additional costs incurred or to be incurred in the Master's Office, caused by the decree not having been properly drawn in the first instance.

Livingston v. Wood, 157.

JUST ALLOWANCES.

See "Special Findings."

LACHES.

See "Nuisance."

LANDLORD AND TENANT.

See "Valuation of Land taken for Canal."

LEASE OF LANDS.

See "Dower."

LESSOR AND LESSEE.

See "Injunction," 2.

"Valuation of Lands," &c.

MAINTENANCE.

See "Will," &c., 7.

MANDAMUS.

Under R. S. O. cap. 40, sec. 86, cap. 49, sec. 21, and cap. 52, ss. 4, et seq., the Court of Chancery could exercise the powers of a court of law in any proceeding, and the powers of the Common Law Courts to grant mandamus upon motion not being by the latter act restricted, the Court of Chancery might also have granted a mandamus upon motion; and under the Judicature Act, nothing appearing to restrict the jurisdiction, the Chancery Division of the High Court of Justice has the same jurisdiction.

Re Board of Education of Napanee and the
Corporation of the Town of Napanee, 395.

MARRIAGE SETTLEMENT.

1. The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside.

Hillock v. Button, 490.

2. The plaintiff, who had just come of age, being about to marry, applied to her solicitor who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage.

Held, that it was not a voluntary settlement; and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake.

Ib.

See also "Trustee," &c., 2.

MARRIED WOMEN, LIABILITY OF ESTATES
OF.

See "Promissory Note," 1.

MECHANICS' LIEN ACT.

The plaintiffs instituted proceedings to enforce a mechanic's lien assigned to them, which had been duly registered, and a suit thereon prosecuted. The plaintiffs claimed to be entitled to priority in

respect of such lien over the claim of a mortgagee—whose mortgage was prior to the contract under which the lien arose—for the amount by which the selling value of the premises had been increased by the work and materials placed thereon. The assignee of the mortgagee demurred on the ground that he was an owner of the land, within the meaning of the Act R. S. O. ch. 120, sec. 2, and that proceedings had not been taken against him within the time specified by the Act.

Held, that he was not such an owner, not being a person upon whose request or upon the credit of whom, &c. the work had been done.

Bank of Montreal v. Haffner, 319.

See also "Will," 8.

MISREPRESENTATION.

See "Specific Performance," 1.

MISREPRESENTATIONS TO PARTY EXECUTING A DEED.

See "Husband and Wife."

MISTAKE OF PARTIES.

See "Consent Decree."

MONUMENTS, ORIGINAL.

See "Surveys."

MORTMAIN.

See "Will," &c., 8.

MORTGAGE, MORTGAGEE, AND MORTGAGOR.

1. The original owner of land created a mortgage thereon in favour of one *M.* and died without redeeming, and the equity of redemption in the premises descended to *C. F.* his heir-at-law, who with her husband *P. F.* joined in a conveyance thereof to trustees charged with the support and maintenance of the plaintiffs, subject to which and the mortgage in favor of *M.* the premises were limited to *F. P.* in fee, who subsequently in September, 1875, out of *W. F.'s* moneys paid the amount due on *M.'s* mortgage, but which was not actually

discharged. In December following *F. P.* sold to *W. F.*, conveyed to him the equity of redemption and procured *M.* to assign his mortgage and convey to him the legal estate.

In March, 1877, *W. F.* mortgaged the land to a loan company but did not assign the *M.* mortgage, and subsequently the plaintiffs filed a bill seeking to have the charge for their maintenance enforced against the mortgage estate :

Held, [reversing the finding of the Master at Hamilton] that the loan company were, under the circumstances, entitled to priority over the plaintiffs to the extent of the amount secured by *M.*'s mortgage.

Fraser v. Gunn, 13.

2. A mortgagor and mortgagee dealt together for some years without having had any settlement of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off, in favour of the mortgagor for the balance due him on their general dealings.

Held, [affirming the finding of the Master] that such right of set-off passed to the official assignee of the mortgagor and that a transferee of the security took it subject to the equity.

Court v. Holland, 19.

3. As between mortgagor and mortgagee, there is nothing to prevent the mortgagee taking possession at a fair and reasonable rent agreed upon between them. In such a case the mortgagee is not a "mortgagee in possession" in the technical sense of the term.

Ib.

4. In such a case, however, a subsequent incumbrancer—prior to the first mortgagee entering into possession—is not bound by such an arrangement ; and the Master may charge the first mortgagee with a fair occupation rent although it exceeds that stipulated for.

Ib.

5. On proceeding with the reference under the decree pronounced on the hearing as reported, *ante* vol. xxviii., page 356, the Master by his report found that there was due to the plaintiff \$1,104.99, which included a sum of \$171.32 costs incurred in the suit brought by him to redeem :

Held, on appeal—[affirming the report of the Master]—(1) that the plaintiff was entitled to claim the costs so incurred, that proceeding having been taken in reality in defence of his rights as owner of an equity of redemption with the concurrence of *C.*, through whom the appellant claimed—and, (2) that neither of the defendants could dispute the findings in that suit, but were estopped from questioning the amount found due therein to the same extent as *Jarvis*, under whom they claimed would have been, the proceeding being not in respect

of a matter collateral to the mortgage in question in that suit, but virtually upon the same instrument, and that therefore the rule as to estoppel by deed applied.

Pierce v. Canavan, 32.

6. The plaintiffs were registered mortgagees of a large tract of land. *M.* desiring to build a mill in a village where part of the land lay, took a deed of a small portion thereof from one of the owners of the equity of redemption, in order that he (*M.*) should erect a flouring thereon. *M.*, without searching the title, and without actual notice of the plaintiffs' mortgage, erected the mill with the intention of establishing a business there. Before its completion, and before the machinery was put in, he discovered the mortgage, but proceeded to put in a boiler, engine, mill stones, and several machines necessary for carrying on milling. On the plaintiffs attempting to sell under their mortgage, the machinery was removed by *M.* An injunction was granted to stay the removal, and an issue was directed to try the title to the mill and machinery. A number of the machines were not attached to the building, being kept in place by their own weight; but they were necessary for the working of the mill, and suited for that purpose only, and the whole structure—building, engine house, boilers, engine, and machinery—was put up with the express purpose of establishing a flouring mill on land that *M.* believed to be his own.

Held, that the mill and its contents passed to the mortgagees; and an order was made for restitution of the machinery which had been removed, and the injunction extended to prevent its removal in future, with liberty to *M.* to pay its value to the plaintiffs, which they ought to accept, if offered, and release the machinery.

Dickson v. Hunter, 73.

7. One of the stipulations of a mortgage was, that "interest should be payable half yearly on * * * Provided that the mortgagees on default of payment for three months, may enter on and lease or sell the said lands without notice: And the mortgagees covenant with the mortgagors that no sale or lease of the said lands shall be made or granted by them until such time as one month's notice in writing shall have been given to the mortgagors."

Held, [*per* PROUDFOOT, V. C.,] that the mortgagees could sell at any time, without notice, after default for three months, and that the purchaser would take a good title; and in any event, a notice served at any time after default was sufficient, and the mortgagees were not bound to wait until default had been made for three months to give such notice: in other words that the month's notice and the three months' default might be concurrent.

Grant v. Canada Life Assurance Co., 256.

8. A mortgage is a "contract" within the meaning of the Insolvent Act of 1875, section 130.

Smith v. Harrington, 502.

Held, in the circumstances stated in the cause that the defendant might hold a mortgage in his favour created by a person in insolvent circumstances for certain advances made by the mortgagee contemporaneously with the execution of the incumbrance, and also for future advances intended to be secured thereby, though it was not shewn that such advances were made for the purpose of enabling the mortgagor to carry on his business: but such mortgage was not a valid security for antecedent advances made by the mortgagee, and in respect of which he had been a surety only, not a creditor.

Ib.

See also "Consolidation of Mortgages."
 "Mechanics' Lien Act."
 "Vendor and Purchaser," 2.

MUNICIPAL ACT.

1. There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation.

Harding v. The Corporation of the
 Township of Cardiff, 308.

2. Upon a construction of sections 373 and 456 of the Municipal Act (R. S. O. ch. 174) a municipal corporation has power to enter upon and take lands for the purposes permitted by the Act without first making compensation to the owner who is not entitled to insist upon payment as a condition precedent to the entry of the corporation.

Ib.

3. Where a municipal corporation had so entered, and a bill to set aside an award for improper conduct of the arbitrators and inadequacy of compensation failed, the Court (PROUDFOOT, J.,) on dismissing the bill ordered the plaintiff to pay all costs, as the corporation had properly exercised their statutory rights.

Ib.

MUNICIPAL CORPORATIONS.

1. *Seemle*, that the combined efforts of secs. 377 and 380 of the

Municipal Act, is to enable the arbitrators in cases coming within these sections to extend the time for making their award beyond the month.

Township of Thurlow v. Township of Sidney, 497.

2. The plaintiff municipality sued upon an award whereby the defendant municipality was ordered to pay their proportion of the cost of a drain constructed by the plaintiffs. It was shewn that the arbitrators met frequently and adjourned from time to time, counsel for the defendants appearing before the arbitrators and raising no objection to such adjournments, or that the month from the date of the appointment of the third arbitrator, as prescribed by sec. 377 of the Municipal Act had elapsed without any award having been made.

Held, that an award made after the expiry of the month was valid.

Ib.

MUNICIPALITY.

1. A municipality may file a bill to compel a railway company to put streets and highways improperly traversed by their line of railway in good repair, and will not be restricted to proceeding by indictment or information.

Fenelon Falls v. Victoria Railway Co., 4.

2. The plaintiff, a Municipal Corporation, filed a bill seeking to restrain the defendants, a railway company, from trespassing by running their track along one of the streets of the municipality without the consent thereof, thus impeding traffic, in contravention of the Railway Act C. S. C. ch. 66, sec. 12, sub-sec. 1.

Held, that by virtue of the Municipal Act there is such power of management, control, &c., bestowed upon municipalities, and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights.

Ib.

3. *Semble*: But for the language used in *Guelph v. The Canada Co.*, ante vol. iv. p. 656, the proper frame of the suit would have been by way of information in the name of the Attorney General, with the corporation as relators.

Ib.

See also "Municipal Act," 1, 2, 3.

NONJOINER OF PRINCIPAL.

See "Parties," 1.

NOTICE OF CALLS.

The notice of two calls, one payable on the 27th of July, the other on the 27th of August, was mailed at Montreal, on the 27th of June, addressed to the firm at Ottawa, which was received by one of the defendants. There was not any affirmative evidence that it was not communicated by him to his co-partner.

Held, that such notice was insufficient, as "not less than 30 days' notice" was required; and therefore the mailing of a notice on the 27th of June, requiring a call to be paid on the 27th of July, was not in time—otherwise the notice was sufficiently established.

National Insurance Co. v. Egleson, 406.

NOTICE OF DISHONOUR.

See "Promissory Note," 2.

NOTICE OF SALE.

See "Sale by Assignee in Insolvency."
"Mortgage," 7.

NOVELTY.

See "Patent of Invention."

NUISANCE.

The plaintiff was owner of a steam vessel plying on Lake Couchiching, and accustomed to run into the River Severn, where it leaves the lake, and to lie in a basin alongside a wharf at Washago. The defendants, in extending their line of railway, constructed a bridge across the river, which completely obstructed the entrance, and caused, it was alleged, special damage to the plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge, which was somewhat too small for its intended purposes. Some correspondence took place while the bridge was in course of construction, by the plaintiff personally, and through his solicitor with the defendants' general manager, in the nature of protests, but the bridge had been in use for several years without action on the part of the plaintiff, when a bill was filed, praying that it might be declared a nuisance, and that the defendants might be ordered to abate it.

Held, that by the delay in taking action, and otherwise, there had

been unequivocal acquiescence in the action of the defendants, and the bill was therefore dismissed, with costs.

Sanson v. The Northern Railway, 459.

OBSTRUCTION OF RIGHT OF WAY.

See "Right of Way," &c.

OBSTRUCTION TO FLOW OF STREAM.

See "Riparian Owners," 1.

OCCUPATION RENT.

See "Mortgage," &c., 3, 4.

OIL, RIGHT TO BORE FOR.

See "Injunction," 2.

ONUS OF PROOF.

See "Solicitor and Client," 1, 2.

ORIGINAL MONUMENTS.

See "Surveys."

OWNER.

See "Mechanics' Lien Act."

PARTIAL DEMURRER.

The propriety of partial demurrers which do not bring up the whole or even a substantial question between the litigants, thus tending to increase costs, considered and remarked upon.

Rumohr v. Marx, 179.

PARTIES.

1. One *M.*, and the defendants as his sureties, executed a bond conditioned for the good behaviour of *M.*, a clerk of the plaintiffs at Montreal. The bond was executed at Hamilton by the defendants who were residents there. *M.* made default at Montreal and absconded. Proceedings were taken against the sureties, without joining *M.*

Held, affirming the order of PROUDFOOT, V. C., that the plaintiffs could not proceed against the sureties alone, if they required the joinder of the principal in order that they might have their remedy over against him.

Per SPRAGGE, C. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, co-eval with the execution of the bond, which became a right of suit on the part of *M.*; and there was also an implied contract on the part of *M.*, upon execution of the bond to repay to his sureties any money that they might have to pay by reason of his default.

Per BLAKE, V. C. The plaintiffs having filed their bill in Ontario, must be taken to admit that the Court has jurisdiction in respect of the matters therein embraced; and the practice of the Court requiring it, and a method having been provided for service of process out of the jurisdiction, the plaintiffs were bound to follow the practice if the objection were taken.

Exchange Bank v. Springer—The Same v.
Barnes, 270.

2. One *C.*, a practising barrister, dealt largely in land transactions, but it was not shewn that he depended thereon for his living. Becoming insolvent, proceedings under the Insolvent Act of 1875 were taken against him. The plaintiff was assignee of a mortgage made by *C.*, and brought suit thereon against *H.*, the assignee in insolvency of *C.*, and *D.* and others, the owners of parts of the mortgaged lands. It was objected by *D.* that *C.* should have been made a party.

Held, that *C.* was not a trader within the meaning of the Insolvent Act, and that nothing passed to the assignee in the insolvency proceedings. *C.* was therefore declared to be a necessary party and leave was given to add him as a defendant.

Joseph v. Haffner, 421.

See also "Injunction," 1.

 PARTNERSHIP.

The defendants, as partners had been appointed agents of the

plaintiffs, on condition that they should become holders of 200 shares of the capital stock of [the Company. In pursuance of this arrangement they were entered in the stock register of the Company for that number of shares, under the partnership name; and 200 shares of the original stock were allotted to them and the usual certificate sent. They did not, however, formally subscribe for the stock. A draft upon the firm for the first call was accepted and paid, as arranged with one of the defendants. Subsequently *E.* wrote to the plaintiffs that he was about retiring from the firm, and desiring to be informed as to the position of the "stock subscribed for by them;" signing the letter as "senior partner," &c.

Held, in an action for calls, that the defendants were liable, and could not be heard to say that they had not subscribed for the stock.

Held, also, that it was unnecessary to show that any specific shares had been allotted to the defendants; or that the calls were made by properly constituted directors.

National Insurance Company v. Egleson, 406.

PASSING PROPERTY.

See "Consignment of Goods," &c.

PATENT OF INVENTION.

The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a patent; but *P.* having obtained a patent therefor, which he assigned to the plaintiff, who again assigned to the defendant subject to certain royalties.

Held, that notwithstanding the invalidity of the patent, he was entitled to recover the amounts payable to him under the agreement during the currency thereof.‡

Owens v. Taylor, 210.

PAYMENT OF CURRENT EXPENSES.

See "Receiver."

PAYMENT ON ACCOUNT.

See "Statute of Limitations," 2.

PER CAPITA OR PER STIRPES.

See "Will," &c., 11.‡

PLAINTIFFS UNDERTAKING.

See "Varying Minutes."

POSSESSION FRAUDULENTLY OBTAINED.

See "Tax Sale," 3.

POWER OF REVOCATION.

See "Marriage Settlement."

"Voluntary Settlement."

POWER OF SALE.

See "Mortgage," 7.

PLEADING.

1. Where a right of suit exists in a body of persons too numerous to be all made parties, the Court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of them an interest identical with that of the plaintiff. But where a mutual insurance company had established three distinct branches, in one of which, the water-works branch, the plaintiff insured, giving his promissory note or undertaking to pay \$168, and the company made an assessment on all notes and threatened suit in the Division Court for payment of such assessment, whereupon the plaintiff filed a bill "on behalf of himself and the other policy holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, and insisting that he and the other policy holders could be properly assessed only in respect of such losses as had arisen since they entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the Division Courts had not the machinery necessary for that purpose.

Held, that according to the statements of the bill, the policy-holders in the water-works branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs.

Thompson v. The Mutual Fire Ins. Co. et al., 56.

2. The defendant having filed his statement of defence, the plaintiff replied thereto by amending his claim, adding to the statement two new paragraphs which would have been demurrable if pleaded as a reply. The matters thereby set up, when separated from the rest of the statement, did not disclose any distinct cause of action. Thereupon the defendant served an amended statement of defence, and demurred to the two paragraphs which had been so added. In view of the fact that the paragraphs which had been so added did not disclose any separate or substantial cause of action, and that the demurrer, however decided, could not advance the cause, the Court (BOYD, C.) overruled the demurrer, but without costs, as it was the first occasion the point had arisen under the Judicature Act.

Rumohr v. Marx, 179.

3. The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and that for that purpose her husband fraudulently conveyed all his lands to the co-defendant, and the bill prayed to have such conveyance declared fraudulent. The grantee in the impeached conveyance demurred for multifariousness, for want of equity, and want of parties. The Court (BOYD, C.) over-ruled the demurrer on the first two grounds, but allowed the demurrer for want of parties; the plaintiff not having recovered judgment and execution could only sue in a representative capacity—that is, on behalf of herself and all other creditors. *Longeway v. Mitchell*, ante vol. xvii., p. 190; *Turner v. Smith*, ante vol. xxvi. p. 198; *Culver v. Swayze*, *ib.* 395, and *Morphy v. Wilson*, ante vol. xvii. p. 1, considered and followed.

Campbell v. Campbell, 252.

4. The bill alleged that the municipal councils of the respective corporations had adopted and sanctioned certain terms and conditions for dividing and settling the several liabilities and assets of the corporations upon their separating, and that both parties accepted such settlements as a final settlement between them, and acted thereupon.

Held, on demurrer, that it was not necessary to allege that such acceptance was by law, although

Seemle, that at the hearing it might be necessary to establish that such was the fact.

The Corporation of the Village of Graven-
hurst v. The Corporation
of the Township of Muskoka, 439.

5. The plaintiffs, *A.* and *J.*, filed a bill for the purpose of having a deed made to the defendant by *J.* declared void, as having been obtained by fraud and misrepresentation. The bill alleged that *J.* had subsequently made a deed of the same property to *A.*, for the

purpose of remedying, as far as he could, the wrong he had done by conveying to the defendant, the bill alleging that such deed to *A.*, was made to him "*as trustee* for the heirs of *A. M.*" who had died seized. The bill in no place alleged that *A.* was trustee, but in the following paragraph it was stated that "before the execution of such last mentioned deed the heirs of the said *A. M.*, who are the rightful owners of the said land," &c.

Held, that notwithstanding the absence of any express allegation of *A.* being such trustee, sufficient was stated to shew that he had accepted the office of trustee, and as such was entitled to litigate the subject matters of the bill, and a demurrer for want of equity was over-ruled with costs.

McLean v. Bruce, 507.

6. A demurrer *ore tenus* for misjoinder of plaintiffs, it appearing by the bill that *J.* had no interest in the question raised, was allowed, without costs.

Ib.

See also "Fraudulent Conveyance," 2.

PRACTICE.

See "Alimony," 1.
 "Appointment of Receiver."
 "Arrest, writ of."
 "Injunction," 1, 6.
 "Judgment," &c.
 "Mandamus."
 "Parties," 2.
 "Pleading," {2.
 "Rehearing."
 "Special Findings."
 "Varying Minutes."
 "Vendor and Purchaser."

PRACTISING BARRISTER.

See "Parties," 2.

PREPONDERANCE OF EVIDENCE.

See "Specific Performance," 2.

PRINCIPAL AND AGENT.

See "Valuer of Land," &c.

PRINCIPAL—INTEREST.

See “Dower,” 2.

AND SURETY.

See “Parties,” 1.

PRIORITY.

See “Mortgage,” &c., 1, 2.

PROMISSORY NOTE.

1. The rule of the Court is that it will not restrain a married woman from dealing with her separate estate pending suit ; but if she die seized thereof, the Court will administer her estate for the satisfaction of her debts.

Held, therefore, that the estate of a married woman deceased in the hands of her infant heirs was liable to the payment of a note on which she was indorser as surety for her husband.

Merchants’ Bank v. Bell, 413.

2. The indorser—a married woman—died intestate during the currency of the note, and notice of protest was sent to “James Bell, executor of the last will and testament of M. A. Bell, Perth,” and received by the husband, who resided with his children in the house which his deceased wife had occupied. No letters of administration had been granted.

Held, that the notice was sufficient, and the interest of the husband as tenant by the courtesy was directed to be exhausted, before resorting to the estate of the children in remainder. The costs of the infant defendants were to be added to the plaintiffs’ claim, and paid out of the estate if not realized against the husband.

Ib.

PROVISION BY WILL.

See “Will,” &c., 1.

PUISNE INCUMBRANCER.

See “Mortgage,” &c., 4.

QUIETING TITLES' ACT.

1. *A.*, in 1835, went into possession of land upon the invitation of *P.*, who promised to give him a deed but subsequently refused to do so. *A.* thereupon determined to remain upon, and succeeded in making a living from the land. *P.* died three years afterwards, having devised the land to *A.* and his wife for their joint lives, with remainder to *J.*, one of the contestants. *A.* occupied the land until 1877, when he executed a conveyance thereof in fee to the petitioner.

Held, on appeal [affirming the decision of the Referee of Titles allowing the claim of the contestants,] that *A.* by his entry had become tenant at sufferances to *P.*, and that as *A.* was aware of the devise to himself, and never did any act shewing a determination not to take the estate so given to him, the estate for life had vested in him, and that he or his grantee could not claim the fee by virtue of *A.*'s possession.

Re Dunham, Petitioner, 270.

2. Some thirty years after *A.*'s entry he granted part of the land to one *B.*, and *J.* joined in the conveyance:

Held, a sufficient admission of the title of *J.* as a remainderman, and so an admission that the will was operative on the land; *J.* having no claim to the land otherwise than under the will.

Ib.

RAILWAY ACT.

See "Municipality," 1.

"Receiver."

RAILWAY CHARTERS.

See "Municipal Act," 1.

REALTY CONVERSION OF.

See "Will," 7.

RECEIVER, APPOINTMENT OF.

Although the duty of the Receiver of the gross proceeds and revenues of a railway, is to pay thereout all expenses necessary for the maintenance, management, and working of the undertaking, he would not be warranted in expending the same in any extraordinary outlay; and where an application was made by the Receiver to

authorize the purchase of a large amount of rolling stock, the outlay in respect of which would require to be met by anticipating income, the Court [BOYD, C.,] refused to sanction the expenditure.

Lee v. Victoria Railway Co., 110.

See also "Appointment of Receiver."
"Chattel Mortgage."

RECEIVER DISCHARGED.

See "Creditors' Rights," &c.

REGISTRY ACT.

The policy of the Registry Act is, to give no effect to hidden equities.

Johnston v. Reid, 293.

REHEARING.

1. Rules 274 and 317, O. J. A., restrict the jurisdiction of the Divisional Court after judgment to cases in which the findings of fact have been undisputed, and in which it is only sought to modify or set aside the conclusion drawn by the Judges therefrom; but if the appeal is on the whole case, as to both facts and law, it must be to the Court of Appeal.

Trude v. Phoenix Ins. Co., 420.

2. Although the decree was pronounced before the Judicature Act, and might have been re-heard under the former practice, yet the cause not having been set down to be re-heard before the coming into force of the Act, it could not under the provisions of the Act respecting pending business, be re-heard.

Ib.

RESERVATION IN CROWN PATENT.

See "Riparian Owners," 2.

RES JUDICATA.

See "Administrator *ad litem*."

REVOCAION, POWER OF.

See "Marriage Settlement."
"Voluntary Settlement."

REVIEW.

In applications to open up proceedings by way of review on the ground of newly discovered evidence, it is necessary for the party applying to establish, (1) that the evidence is such that if it had been brought forward at the proper time it might probably have changed the result; (2) that at the time he might have so used it neither he nor his agents had knowledge of it; (3) that it could not with reasonable diligence have been discovered in time to have been so used; and (4) the applicant must have used reasonable diligence after the discovery of the new evidence.

Where, therefore, a railway company in the construction of their road took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor, and under the decree a sum of \$1,800 was found to be the value of such plot, which sum, together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company, and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously paid a prior owner of the land for a portion thereof.

The Court (FERGUSON, J.,) refused the relief asked, with costs, on the ground, amongst others, that the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment.

Dumble v. The Cobourg and Peterborough
Railway Company, 121.

RIGHT OF WAY, OBSTRUCTION OF.

An arrangement made between the plaintiff and *B.*, whereby the latter "was allowed to go through" the plaintiff's land, was superseded by an arrangement whereby, in consideration of 150 cords of wood and the making of the road by *B.*, the latter was to have a right of way through the same land. The plaintiff was to erect and keep up the gate at one end, and *B.* was to keep up the gate at the other end of the road. The wood was delivered, and the road made, according to the terms of the agreement. The plaintiff subsequently erected three additional gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain the defendant from using the way except upon the terms of shutting those three gates when going through.

Held [reversing the decree of SPRAGGE, C.,] that the right of way having been purchased when there were but two gates, the plaintiff had no power to fetter the enjoyment of the way by adding additional gates.

Kastner v. Beadle, 266.

RIPARIAN OWNERS.

1. Under a conveyance of land, on a stream not navigable, described as running from, &c., "south, &c., to the northern side of the * * river," "then north-easterly along the bank of the said river, with the stream to the centre of the said lot." *Seemle*, that the grantee was bound by the bank of the river, and had not any right to extend the boundaries to and along the middle or thread of the stream; but, *held*, whether he had or had not such right, he could not by reason thereof erect any structure in the stream that could or might affect prejudicially the flow of the water as regards other riparian proprietors.

McArthur v. Gillies, 223.

2. The patent from the Crown of a lot of land situate on the bank of a river, reserved free access to the bank for all persons, vessels, &c. There was a quantity of stone on the lot, which the plaintiff desired to quarry, but was prevented by the penning back of the water of the river by the defendant, the owner of a mill thereon below the plaintiff's land.

Held, that the reservation by the Crown in the grant was merely an easement to the public, notwithstanding which the plaintiff was a riparian proprietor, and as such entitled to complain of the injury caused by the penning back of the water.

Hawkins v. Mahaffy, 326.

3. The parties desired the assistance of scientific evidence as to the height of the defendant's dam, and the effect of raising it. The Court (PROUDFOOT, J.,) appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained.

Ib.

 ROLLING STOCK.

See "Receiver."

 ROYALTIES.

[PAYABLE UNDER VOID PATENT.]

See "Patent of Invention."

 RULE OF PROCEDURE.

See "Church Society," 3.

SALE BY ASSIGNEE IN INSOLVENCY.

The rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of such power, is also applicable to sales by a trustee or *quasi* trustee acting under a power;—the power must be followed: and the rule applies with equal force to sales by an assignee of an insolvent estate, under the Act of 1869, sec. 47 who in such cases acts under a statutory power authorizing a sale, “but only after advertisement thereof for a period of two months.”

In re Frederick W. Jarvis v.
George J. Cook, 303.

An assignee proceeded to sell the lands of the insolvent without giving notice of such intended sale “for a period of two months,” as prescribed by the Act, no sanction of the creditors thereto having been given.

Held, a good objection to the title by a vendee of the purchaser at such sale.

Ib.

SCHOOL SITE.

See “School Trustees.”

SCHOOL TRUSTEES.

A municipal corporation has no discretion in accepting or rejecting the requisition of school trustees for funds for a school site, except by a two-thirds vote. An adverse vote by a smaller majority is a virtual acceptance, and the requisition must therefore be complied with.

Re Board of Education of Napanee
and the Corporation of the Town
of Napanee, 395.

SCIENTIFIC EVIDENCE.

See “Riparian Owners,” 3.

SECURED CREDITORS, RIGHTS OF.

The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge.

Held, that the debt under the chattel mortgage was not extinguished.

Beaty v. Samuel, 105.

SHARES, FORFEITURE OF—ON DEFAULT OF PAYMENT.

See "Building Society."

SHERIFF, CERTIFICATE BY, OF SALE FOR TAXES.

See "Tax Sale," 2.

SOLICITOR AND CLIENT.

1. *C.*, who was in active practice as a lawyer, and the author of several useful legal treatises, had obtained a mortgage on a valuable leasehold estate, and having taken such proceedings as resulted in a forfeiture of the mortgagor's term, procured from the owner of the property a renewal of the lease to himself. The mortgagors instituted proceedings to redeem, but *C.*, asserting that he was absolute owner of the interest, instructed solicitors to defend the suit. They expressed to *C.* some doubt as to his right to resist the claim of the mortgagors, whereupon he, with one of the solicitors, went to a counsel of note, who, without having time to give the case full consideration, verbally advised them that the suit should be defended. *C.* drafted his answer, his solicitor adding one clause. Counsel retained for the hearing told *C.* he would undoubtedly fail in the litigation, and subsequently the usual decree for redemption was pronounced, *C.* being ordered to pay such costs as had been occasioned by his resisting redemption. It was alleged against the solicitors that they had advised *C.* that he would be entitled to costs in any event: that they had refused to consider or submit to him an offer to pay the mortgage money and costs, on the ground as they alleged that *C.* claimed about three times the sum offered: that they had colluded with the mortgagors' solicitor in having proceedings instituted, which they wrongly advised him to defend; and that he had a good defence, but the same had been negligently managed. There was a written retainer, which did not express any special arrangement as to costs or the terms on which the defence was to be conducted. The Court being of opinion that *C.* had failed to make good his charges against the solicitors, affirmed the order made by SPRAGGE, C., reversing the finding of the Taxing Officer that the solicitors were not entitled to recover the costs of the litigation.

Re Kerr, Akers & Bull, Solicitors, 188.

2. Although in a simple case of a distinct assertion and a distinct denial of a fact at the time of a client retaining a solicitor, thus forming a part of the contract, it may be a proper rule to say that in such a case the solicitor has himself to blame when any difficulty arises, as he might have protected himself by having his retainer in writing, there is not any authority for extending that rule to facts arising after the retainer and during the progress of the litigation. In any event the rule applies only where it is simply oath against oath, not where there is other evidence direct or circumstantial in support of the solicitor's.

Ib.

SOLICITOR ORDERED TO REFUND COSTS.

See "Administrator *ad litem*."

SPECIAL FINDINGS.

The Master, at the request of the defendant, reported specially in his favour as to many matters not particularly referred to him, but which formed the subject of charges of fraud made in the bill of complaint :

Held, that the Master had power to report specially any matters he deemed proper for the information of the Court, and that it was his duty to so report any matter bearing on the question of costs.

Hayes v. Hayes, 90.

SPECIFIC PERFORMANCE.

1. In a suit for specific performance, the defendant set up that the reason he had refused to complete the agreement was, that he had been induced to enter into it by certain misrepresentations of the plaintiff, but which he entirely failed in proving. Although the Master reported that a good title was first shewn in his office, the decree on further directions ordered the costs to be paid by the defendant, notwithstanding that the bill contained certain statements which it was alleged were not true, and had not been proved, the Court being of opinion that such statements had not any material bearing upon the case, and that a suit would have been necessary without reference to the question of title.

Platt v. Blizzard, 46.

1. In a suit for specific performance it was shewn that the plaintiff had agreed to convey to the defendants certain lands in consideration of his being paid one-third of the sum for which defendants should be

enabled to sell the same. This agreement was subsequently cancelled on the defendants undertaking to pay plaintiff \$2000, one-half by a note, the other half by the conveyance of certain town lots at an ascertained valuation; and this second or substituted agreement the plaintiff sought to enforce. The defendants set up that in consequence of their ascertaining the plaintiff had not a title to the land conveyed to them, a fresh agreement was entered into to the effect that the defendants should be at liberty to sell the land, and pay to plaintiff one-third of the net proceeds, and which they asserted they had done. At the hearing the Court (SPRAGGE, C.) being satisfied that the defendants' account of the transaction was correct, refused the relief claimed, but offered the plaintiff a reconveyance on payment of costs, which the defendants assented to, or a decree upon the footing of the third or last mentioned agreement upon payment of costs: On rehearing, this decree was affirmed, with costs.

Rutherford v. Sing, 511.

STATUTE OF LIMITATIONS.

1. Where a vendor was not in possession of lands, the fact that for upwards of ten years he had paid the taxes on the property is not such a possession as is requisite to bar the right of the owner under the Statute of Limitations.

Re Jarvis v. Cook, 303.

2. A promissory note made by the purchaser, and indorsed by his son, was given as security for the payment of land sold to the defendant, on which note a payment had been made by the indorser.

Held, that such payment was properly applicable to reduce the amount remaining due upon the purchase money, and was sufficient to prevent the running of the statute.

Slater v. Mosgrove, 392.

See also "Quieting Titles' Act," 1.
"Retainer by Executors in full."

STAY OF PROCEEDINGS.

See "Injunction," 6.

STOCK-IN-TRADE.

See "Chattel Mortgage."

STOCKS, SUBSCRIPTION FOR, BY
PARTNERSHIP.

See "Partnership."

STREETS AND HIGHWAYS, REPAIRS OF.

See "Municipality," 1.

. SUBSEQUENT INCUMBRANCER.

See "Mortgage," &c., 1.

SUBSTITUTING AGREEMENTS.

See "Specific Performance," 2.

SUFFICIENCY OF NOTICE OF DISHONOUR.

See "Promissory Note," 2.

SUITS IMPROVIDENTLY INSTITUTED.

See "Administrator *ad litem*."

SURVEYS.

In questions relating to boundaries and descriptions of lands, the well-established rule is, that the work on the ground governs; and it is only where the site of a monument on the ground is incapable of ascertainment that a surveyor is authorized to apportion the quantities lying between two defined or known boundaries. Therefore, where an original monument or post was planted as indicating that the north-west angle of a lot was situated at a distance of half a chain south therefrom, and another surveyor had actually planted a post at the spot so indicated, and subsequently two surveyors, in total disregard of the two posts so planted, both of which were easy of ascertainment, made a survey of the locality and placed the post at a different spot, the Court [SPRAGGE, C.] disregarded the survey, and declared the north-west angle of the lot to be as indicated by the first mentioned monument.

Artley v. Curry, 243.

TAX SALE.

1. The north part of a lot, called lot 1 in one survey and lot 4 in another, of 100 acres more or less, was assessed variously as "number 1, N. half," &c. "Number 1, N. part," &c. N. half lot number 1," &c., and "broken lots 1 and 4." The collector's roll shewed similar discrepancies.

Held, that though these irregularities indicated want of care and accuracy in the officers of the Municipality, they did not invalidate the assessment, as the land was sufficiently pointed out. *McKay v. Cryster*, 3 S. C. R. 436, distinguished.

Held, also, that the words "be the same more or less," following the description of the quantity of land, improperly inserted in the sheriff's deed, might be rejected as surplusage.

Nelles v. White, 338.

A sheriff's certificate of sale for taxes is made for the purpose of giving the purchaser certain rights, in order to the protection of the property, until it is redeemed or becomes his absolutely, and forms no part of his title. The description in it being defective does not invalidate the sheriff's deed, nor *Semble*, would its absence.

Ib.

3. The plaintiff was assignee in insolvency of *H.*, who bought from the purchaser at the sheriff's sale. *H.* leased to *T.* and put him in possession, and had some small buildings put on the land. Subsequently, the defendant *O.* made untrue representations to *T.*, which induced him to quit possession, whereupon *O.* went in and occupied, claiming under defendant *W.*, who, he alleged, had an interest in the land. *W.*, by his answer, adopted *O.*'s possession and claimed under conveyance from the Crown, but failed to prove his title.

Held, following *Doe Johnson v. Baytup*, 3 A. & E. 188, that the possession so fraudulently obtained by *O.* did not entitle him to put the plaintiff upon proof of his title.

Ib.

4. *Quære*, whether since 35 Vict. ch. 36, and preceding statutes, when some taxes are in arrear, but a sale has been made for more, the defect is cured.

Ib.

[Affirmed on appeal, 6th February, 1883.]

TAKING FURTHER EVIDENCE AT SITTINGS.

See "Appeal from Master."

TAXES, PAYMENT OF

See "Statute of Limitations," 1.

TENANT FOR LIFE.

See "Dower," 2.

TIME FOR MAKING AWARD.

See "Arbitration," 1.

TRADER.

See "Parties," 2.

TRESPASS.

See "Municipality," 1.

TRIAL BY JUDGE.

See "Rehearing."

TRIFLING AMOUNT.

See "Dignity of Court."

TRUSTEE AND *CESTUI QUE TRUST*.

1. The defendant was the assignee of a policy of assurance on his brother's life, in trust to pay himself certain moneys and expend the residue in the support and maintenance of the assured's family, and having made further advances on the advice of his brother, who was a practising barrister, he took a second assignment of the policy absolute in form. On the death of the assured, the defendant, asserting a right to obtain payment of the policy, went to the head office of the company in the United States, in order to hasten the payment, pending a dispute with the plaintiffs—the family of the assured—as to his rights. In taking the accounts between the parties, the Master found that the defendant acted *bonâ fide* in so doing, and allowed his expenses, although the company, at the instance of the

plaintiffs, refused to pay him, and sent the proceeds of the policy to their solicitors in Toronto, to be paid over to the party entitled..

Held, on appeal from the Master [affirming his ruling] that as the defendant was under either assignment entitled to possession of the fund— either as trustee or individually—and as the Master under all the circumstances, thought fit to allow such expenses, and it did not appear clear to the Court that such allowance was wrong, the item should be allowed.

Held, also, that the Master had properly allowed to the defendant in his accounts a fee of \$10 paid by him to counsel for advice as to his action in respect of the two assignments.

Hayes v. Hayes, 90.

2. The plaintiff, in 1854, being about to marry, conveyed certain lands to trustees—one of whom was her intended husband—upon trust to suffer her to receive the rents, &c., to her own use during her natural life, and upon her death, if she should leave a child or children surviving her, in trust to convey the lands, &c., unto such child or children, their heirs, &c., for ever, freed and discharged of the trust mentioned in the deed ; and in case of her death before her husband without any child, in trust to permit him to receive the rents. &c., for life, and after his death, or in case he should die before the plaintiff, she leaving no child, then in trust to convey the said lands to her right heirs, freed and discharged from the trusts thereof. The deed gave the trustees power to sell or lease, and also to borrow on the security of the lands.

The husband died in 1879, there never having been any child of the marriage, and the plaintiff, who was then fifty-three years old, requested the trustees to reconvey the trust estate to her, which they declined to do without the sanction of the Court, as the trust for children was not confined to the issue of the then contemplated marriage, but was wide enough to include the children of any other marriage : but

Held, that as there were no children, and it must be assumed that the plaintiff never could have any children, she was entitled, as equitable tenant in fee simple, to call upon the trustees for a conveyance : the costs of the trustees to come out of the estate.

Farrel v. Cameron, 313.

See also “ Co-Trustee, Liability of.”

TRUST FOR CREDITORS.

After a debtor had executed a chattel mortgage to the plaintiff, with a covenant for payment, he became insolvent, and made a common law assignment for the benefit of creditors of all his property to the defendant in trust to pay expenses, &c., and “ to apply the balance

in or towards payment of the debts of the assigner in proportion to their respective amounts without preference or priority."

Held, that the plaintiff, who was not scheduled as a creditor in proceedings in insolvency, was entitled to sue for the whole debt, and therefore to share in the estate proportionately under the deed for the whole, and that he was not bound to value his security and rank for the balance only.

Beaty v. Samuel, 105.

TRUSTEE FOR SALE.

The plaintiff being a trustee for sale was held not to be in a position to ask for partition.

Keefer v. McKay, 162.

ULTRA VIRES.

See "Corporation," 1, 2.

UNTAXED COSTS OF FORMER MOTION.

See "Injunction," 3.

UNDERTAKING BY PLAINTIFFS.

See "Varying Minutes,"

VALUABLE CONSIDERATION.

See "Consolidation of Mortgages."

VALUATION OF LANDS.

[TAKEN FOR CANAL.]

The Government of Canada having taken the land of the defendant's testator for the purposes of the Welland Canal, paid into Court, under the statute, a sum awarded by the valuers, intended to cover all claims which the owner might have of any kind. The owner was to be at liberty to remove buildings, &c., and on payment of the money to convey free from all other incumbrances, including taxes. The plaintiff was lessee of the property so taken, and claimed compensation for disturbance.

Held, that the plaintiff was entitled to be compensated out of the money paid into Court, and that his claim was one which the owner was liable, under Stat. 37 Vict, ch. 13, sec. 1 D., to pay, and which should have been taken into consideration, and which the evidence shewed had been taken into consideration in settling the amount to be paid by the government on taking possession of the lands.

In re The Welland Canal Enlargement,
Fitch v. McRae, 139.

VALUER OF LAND.

[LIABLE FOR LOSS.]

The paid agent of a Loaning Society, who professed to be skilled, and had a knowledge in the valuing of lands, was held liable to the Society for a loss sustained by them by reason of a false report of such agent.

Silverthorne v. Hunter, 5 A. R. 157 distinguished.

Hamilton Provident and Loan Society v. Bell, 203.

VARYING MINUTES.

1. On a motion to vary minutes, nothing can be done at variance with the order as granted, but additions or variations may be made so as to carry out the intention of the Court in pronouncing it.

Hendrie v. Beatty, 423.

2. An interim injunction was granted, without going into the case, on terms of an undertaking, given by the defendants upon a prior return of the motion, that nothing should be done in the meantime. On settling the minutes the registrar refused to comply with the request of the defendants, by inserting an undertaking on the part of the plaintiffs that the property be retained in the same plight and condition as at the date of the order. A motion was made to vary the minutes by inserting such an undertaking.

Held, that though the undertaking might have been properly asked for on the motion as a condition of granting the injunction, it could not now be exacted, as the effect would be to reverse or alter the order which had been made by arrangement of the parties. As a misunderstanding seemed to have arisen, however, the injunction was stayed for ten days to allow a substantive motion to be made for an injunction restraining the plaintiffs from doing anything detrimental to the property pending the interim injunction.

VENDOR AND PURCHASER.

1. A vendor agreed to pay off a mortgage existing on the property, and the decree directed a good and sufficient conveyance "according to said agreement." The defendant, the vendor, neglected to pay off the mortgage, and the plaintiff thereupon moved upon petition to amend the decree by ordering the defendant to obtain a discharge of such incumbrance; but the Court [Boyd, C.,] directed that the vendor pay off the mortgage within a limited time, or in default, that the purchaser should be at liberty to do so, procure an assignment, and have his remedy against the vendor, whose conveyance he was not bound to accept till this mortgage was paid off: the purchase money in Court to be applied *pro tanto* thereto.

Held, also, that as the matter had been referred to the Master by the decree which was for specific performance, it should have been disposed of in his office under G. O. 226.

Stammers v. O'Donohoe, 54.

[Affirmed in Appeal 6th February, 1883.]

2. The plaintiff purchased a house and lot from defendant for \$2,000, paying \$1,000 in cash, and assuming a mortgage to a building society "on which \$664 is yet unpaid," and giving a mortgage to the defendant for the balance. The defendant covenanted that he had not incumbered, save as aforesaid. Subsequent inquiries shewed that there were due the society seventy-one monthly instalments of \$16.75, in all, \$1,189.25, and the plaintiff insisted that she was entitled to credit from the defendant for the difference between \$664 and the latter sum. But

Held, that the plaintiff was entitled to retain in her hands only the cash value of the mortgage at the date of her purchase, if the society would accept it, if not then such a sum as, with interest on it, would meet the accruing payments.

Stark v. Shepherd, 316.

3. The defendant by his answer admitted an error in the computation of the amount due the society, and offered to pay the difference between the \$664 and what he alleged was the cash value and costs up to that time.

Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer.

Ib.

 VENDORS AND PURCHASERS' ACT.

A mortgage was made, pursuant to 9 Vict. ch. 90, to the president and treasurer of a building society, their successors and assigns, in trust for the society. The society having subsequently exercised the

power of sale, the then president and treasurer, successors of the original mortgagees, conveyed to the purchaser by a deed under seal not being the society's seal. The purchaser sold to *G.*, who objected to the title.

Held, that the lands were conveyed in fee simple to the president and treasurer by the mortgage, and that these officers for the time being had power to convey in fee, that the power was duly exercised by them, and *G.* was bound to accept the title.

Re Inglehart and Gagnier, 418.

VESTED INTERESTS.

See "Will," &c., 4, 6, 12.

VESTED REMAINDERS.

See "Will," &c., 2, 3.

VOLUNTARY SETTLEMENT.

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside.

Hillock v. Button, 490.

WATER'S EDGE.

See "Riparian Owners," 1.

WIDOW.

See "Dower."

"Will," &c., 7.

WILL, CONSTRUCTION OF.

1. A testator devised to his widow his "house and orchard for a home for herself and her children as long as she may live," and to his son *Duncan* all his title and interest in the farm lot, and all implements thereon, "at the death of my wife as aforesaid, on condition that he shall provide for her board and maintenance, he, my son *Duncan* holding possession of the land from the time of my decease, subject to the proviso aforesaid :"

Held, that the widow was put to her election between her dower and the provision made for her by the will; the latter forming a charge upon the lands devised.

McLellan v. McLellan, 1.

2. A will contained a devise in trust for the support and maintenance of the testator's widow during her life or widowhood, with a direction that she should have the full right to possess, occupy, and direct the management of the property; and at her death or second marriage, "my son *Thomas*, if he be then living, shall have and take lot one, which I hereby devise to him." *Thomas* died before his mother.

Held, that he took a vested remainder in lot one.

Keefe v. McKay.

3. The will further contained a devise of lots two, &c., to the testator's sons, *Alexander*, *John*, *Charles*, and *Thomas*, their heirs and assigns, as tenants in common, and a direction that the same should take effect from and after the death or second marriage of the testator's widow. There was a proviso that if any child died without issue before coming into possession of his share, the same should go to the survivors. An indenture was executed between the parties, conveying all the estate, &c., of those interested to *Alexander*, *John*, *Charles*, and *Thomas*, after the execution of which *Alexander* and *Charles* died. An Act of Parliament was subsequently passed confirming this indenture, and declaring that it should take effect from its date, and not be affected by the subsequent death of any of testator's children; and it confirmed the estate in *John* and *Thomas* as tenants in common, subject to the life estate of their mother; with the right of survivorship between them in case of one dying before the other without issue, before the death or marriage of their mother. After this, and in his mother's lifetime, *Thomas* died, having, however, survived his brother *John*, who died without issue.

Held, that *Thomas* took a vested remainder in fee expectant upon the determination of his mother's life estate.

Ib.

4. The residue of the estate was directed to be converted, and to be at the disposal of the widow for her life, while she remained unmarried, and thereafter to the children. This was subject to the above proviso as to coming into possession.

Held, that the children took vested interests in the fund, subject to be divested on the happening of the contingency mentioned.

Ib.

5. Three weeks before the testator died he made his will whereby he directed his lands to be sold, and out of the proceeds gave \$2000 to his widow in lieu of dower and further directed that "all moneys

then remaining in the hands of my executors shall be divided between the following funds," naming five different charities in connection with the Canada Presbyterian Church—such "money to be divided in which ever way my executors may think best."

Held, that the bequests to the charities were void under the Mortmain Acts ; and there being no residuary clause the bequests so failing to take effect went to the heirs-at-law, not to the next of kin of the testator : costs of all parties to be paid out of the estate.

Re Trusts of John McDonald's Will, 241.

6. The testator, after having duly made his will, intending to modify it, wrote a letter to his wife, in which he said, "I wish my dear wife and our children to have all my property to be divided equally, my wife to have the use of the whole until the children are of age ; in case of death of my children, my wife to have the use of the property for her lifetime, and then to go to my brothers and sisters." The testator left two children, who died during the lifetime of their mother, under age and unmarried.

Held, that the words "in case of death of my children" referred to death before the testator, so that the children took vested interests which the mother took upon their death.

Dumble v. Dumble, 274.

[Reversed on Appeal, 8 A. R. 476.]

7. A testator devised all his real and personal estate, to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life ; and after the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in a course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution, amongst them, the share or respective shares only, which the deceased parent or parents, would, if living, have taken.

Held, (1) that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will ; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose : (2) that a complete conversion had been effected by the trust for sale in the will, so that the interests of the sons should be ascertained as if the will consisted of personal estate only ; and (3) that the sons took life estates therein only ; and one

of the sons having died without children that there was an intestacy as to his share, subject however, to a proportion of the charge for the maintenance of the widow.

McGarry v. Thompson, 287.

8. A will contained this clause :—"I will and desire that the residue of my real and personal estate, being the sum of \$2,800, more or less, shall be paid to the four Churches of England, in the townships of Orford and Howard, in four equal parts to each such churches as follows : To Trinity Church, Howard ; St. John's Church, Morpeth ; St. ——— Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively ; and in case of no debt, or there being a balance or residue after the payment of such debt or debts on each of such churches, respectively, then the residue (if any) is to be paid by my executors to the churchwardens of such Church, to be held by them in trust : and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the Incumbent of said church as a portion of his salary or stipend."

Upon a special case stated for the opinion of the Court, it was shewn that there was a large debt existing on the Morpeth Church for money borrowed on mortgage wherewith to pay off the building debt. The church at Clearville was not built at the time of the testator's death, but some debts were existing in respect of materials and work on the foundation.

Held, (1) that the mortgage debt on the Morpeth Church could not be considered as a building debt ; but if it could be so considered the bequest to pay the same would be void, under the statutes of Mortmain. (2) That as to the Clearville Church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics' Lien Act, and the bequest to pay off those debts would therefore be void, unless the work was being performed in such a manner as excluded the creation of a lien on the land. (3) That the bequest for the benefit of the Incumbent would have been void if the investment had been directed to be made upon realty ; but as the trust might be carried out by investing on personalty the bequest was valid if so invested. (4) That the amount to which the Incumbent would be entitled was the residue after deducting the void bequests for debts.

Stewart v. Gesner, 329.

9. A testator directed that, at the death of his wife, if she survived him, all his estate (with certain exceptions) should be sold and the proceeds equally divided among his four daughters and three sons and their children, after paying \$200 to each of the three children of his deceased daughter *R*. He left surviving him his

widow, who was still living, three sons and four daughters and twenty-seven grandchildren, besides the children of *R.* Two of the grandchildren, were born after the date of the will but before the testator's death, and one was born after his death.

Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the Court declined to make any order upon the will.

Dryden v. Woods, 430.

10. A testator, who died in February, 1869, by his will, amongst other things, gave legacies payable in eight and thirteen years, and devised lot eight to his son *R.*, and lot nine to his son *D.*, subject to charges, the devisees to get possession thereof when his youngest child attained twenty-one. At that time *D.* and *R.* were to get one-half of the stock and implements which would at that time be on the said lots, the other half to be divided amongst other legatees. The youngest child had not yet attained twenty-one. The Master at Hamilton directed an account to be brought in of the stock and implements at the time of the reference on said lots, being the proceeds of the old stock left thereon by the testator, and also those subsequently procured from the produce of *the said lots*, and also an account of the stock or implements left by the testator which still remained on the land. The defendants appealed on the ground that if any further account was to be furnished, it should be only of stock and implements purchased with the proceeds of the sale, or obtained by the exchange of the stock or implements left by the testator; which appeal was dismissed with costs.

Davidson v. Oliver, 433.

11. The testator bequeathed his residuary estate, all other property, in lands, mortgages, and stocks, to his grandchildren, "the children of *J. C.*, and of my daughter, *A. J. B.*, wife of *D. B.*, share and share alike, on their coming of the age of twenty-five years, to be finally determined and paid to them on the youngest coming to the age of twenty-five years. Provided, nevertheless, that each one on coming to the age of twenty-five years receive a portion of not more than half what their share will be on the youngest coming of age." (Then directions were given as to keeping books of account, and managing the estate.) "And when the books so audited shew the revenue of my estate, after paying the before mentioned bequests, taxes and other charges on the same, amounts to £500, then half of such revenue or income be divided, share and share alike, between the families of my son, *J. C.*, and the family of my daughter, *A. J. B.*" (The other half going into the estate.)

Held, (1) that the children referred to took *per capita*, and not *per*

stripes; (2) that when the eldest attained the age of twenty-five years, he was entitled to receive one-half of his share, payment of which could not be delayed, and that date must be taken as the period at which those to take were to be ascertained; and that any child born subsequent to the time the eldest child attained twenty-five was excluded, and all born before that period were entitled to share in the estate; (3) that the children did not take vested interests—the gift to each being contingent on attaining twenty-five; (4) that twenty-five was the age at which the parties became entitled to an arrangement as to the amount of their shares; (5) that the trustees could charge the shares of any who had been overpaid with the excess of such payments.

Anderson v. Bell, 452.

[Affirmed on Appeal, 8 A. R. 518.]

12. The testator directed all his lands to be sold by public auction or private sale on his youngest surviving child attaining 21, and the proceeds to be divided amongst nine of his children, share and share alike; but in the event of either of the nine children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors.

Held, that these words did not create an estate tail or *quasi* entail and that the shares of the legatees were vested.

Scott v. Duncan, 496.

WOMAN PAST CHILD-BEARING.

See "Trustee," &c., 2.

ERRATUM.

Page 490, second line from bottom, for "recovery of," read *reconvey if*.



